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An Analysis of the Cessation of Contractual Relations

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A party seeking cessation of contractual relations may introduce many justifications for its actions. The party may claim that its contracting counterpart materially breached the contract or failed to perform an express condition precedent. Absent a breach, the party seeking to end the contract may assert that the right to terminate was expressly or implicitly reserved in the agreement.[1] Alternatively, the party may claim that a mistake or an unanticipated circumstance excuses its obligation to perform.

In such situations, the interests of the contracting parties in the enforcement of the contract often diverge. The nonceasing party may have relied materially on the expectation of contract performance, or even in the absence of reliance, may have anticipated substantial gains from performance. On the other hand, performance of the contract may cause the ceasing party severe economic harm. Courts must harmonize these conflicting interests in determining whether to enforce the contract by finding the party ceasing performance liable for damages or to permit cessation of performance by upholding the claim of breach, termination or excuse.[2]

This article is a study of contract law's response to the problem of cessation.[3] I have two primary goals. My first goal is to demonstrate that the courts generally have taken a common approach to the issue of cessation.[4] Although the cessation issue arises in many settings and has

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1 *Cf.* U.C.C. § 2-106(3) (1977) (" 'Termination' occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach."); *id.* § 2-106(4) (distinguishing "cancellation" from "termination").

2 For a discussion of the appropriate remedy for unwarranted cessation, see *infra* notes 141-51 and accompanying text. For specific discussions concerning remedies for the various types of cessation, see *infra* Part II. *See generally* Fuller & Perdue, *The Reliance Interest in Contract Damages: 2,* 46 YALE L.J. 373, 383 n.111 (1936) (courts determining whether termination constitutes breach are influenced by "whether the plaintiff had changed his position in reliance on the contract").

3 Many of the same considerations in determining the right of cessation after contract formation also apply to the revocation of offers before a contract is technically formed. This article focuses entirely on the former problem.

4 *See infra* Part II.

generated various constructs, such as material breach, good faith termination, material mistake, frustration, and impracticability, such constructs are misleading to the extent that they suggest that fundamentally different considerations govern their adjudication.

My second goal is to explain the common approach to cessation. Contract law's response to the problem requires an initial determination of whether the parties have expressly assigned the right of cessation by including an express condition, termination clause, or excuse clause in their contract. Our legal system generally will enforce the parties' express agreement concerning cessation of performance because it respects the rights of individuals to order their own affairs,[5] provided that they do so with free and knowing assent.

Even assuming, however, that issues of assent are absent, the problem of cessation is more complex than simply referring to the contract and enforcing the express agreement. First, although the parties are generally free to make their own agreements, individual liberty is circumscribed by society's countervailing interest in protecting individuals from harm and avoiding agreements that "shock the conscience."[6] In extreme situations, then, contract law will nullify the parties' express approach to cessation.[7] Second, cessation analysis is also more complex than merely enforcing the parties' express agreement because the parties often fail to allocate contract risks and entitlements clearly.[8] In such situations, courts must attempt to ascertain the parties' intentions concerning cessation. If the parties had no intentions, or their intentions are not cognizable, courts must determine the right of cessation for them. The weaker the evidence of intent concerning cessation, the greater the likelihood that courts will discount such intentions.[9] When the courts heavily discount the parties' intentions, or when the evidence clearly indicates that the parties failed to reach an agreement concerning cessation, courts primarily attempt to do what is fair under the circumstances.

Determining the right of cessation in cases that involve express cessation clauses and in cases where the parties' approach is unclear, thus requires further investigation into the meaning of fairness in the cessation context.[10] Four interrelated fairness norms figure prominently in

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5 *See generally* C. FRIED, CONTRACT AS PROMISE chs. 1-2 (1981).

6 *See* Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302,* 67 CORNELL L. REV. 1, 25-26, 31-32 (1981).

7 *See infra* notes 25-39, 199-207 and accompanying text.

8 *See infra* notes 40-41, 65-69 and accompanying text.

9 Professor Fried observes that "as we move further from actual intention the standard of presumed intention tends to merge into the other substantive standards used to solve the problems caused by a failure in the agreement." C. FRIED, *supra* note 5, at 61.

10 Cohen, *The Basis of Contract,* 46 HARV. L. REV. 553, 584 (1933) ("Just as the process of interpreting a statute is really a process of subsidiary legislation, so is the interpretation of a

such analysis. A first norm dictates that courts should favor the party with greater equities.[11] Courts effectuate this comparative equities norm by balancing one party's reliance interest and potential gains from performance with the prospect of economic harm to the other party from performance.

A second fairness norm dictates that a party should not knowingly cause harm to another without justification.[12] This harm-avoidance norm insulates a contracting party from severe economic loss resulting either from the other party's attempted cessation or enforcement of the contract in the absence of countervailing harm to that other party.[13]

A third fairness norm is that a party must act reasonably to avoid harming itself. The reasonableness inquiry requires a comparison of a party's conduct to that of similarly situated parties or general community standards. If a party's conduct was unreasonable, the harm the party suffered by reason of cessation or performance is not caused by the other party and therefore the courts will discount it in the balancing process.[14]

A final fairness norm is that each party should benefit from an agreement roughly according to the contract allocation.[15] Courts demonstrate the significance of this reciprocity norm when they consider expected benefits, as well as prospective harm,[16] in balancing interests even when the parties' rights are uncertain because of an unclear cessation approach or because of a gap in the agreement.

Although decisions concerning cessation sometimes discuss other social policy related reasons, such as the avoidance of economic waste and the encouragement of contract formation, a survey of opinions involving the various types of cessation suggests that, besides freedom of contract, fairness reasons typically represent the primary or only justification.[17]

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contract really a method of supplementing the original agreement by such provisions as are necessary to determine the point at issue.").

11 *See infra* notes 80-105 and accompanying text.

12 *See* Summers, Rightness Reasons in the Law of Contracts 5, 11 (1981) (unpublished essay on file with author); *infra* notes 106-24 and accompanying text.

13 *See infra* notes 106-24 and accompanying text.

14 *See infra* notes 125-34 and accompanying text.

15 *See infra* notes 135-40 and accompanying text. *See generally* Fárnsworth, *Disputes Over Omission in Contracts,* 68 COLUM. L. REV. 860, 878 (1968) (courts interpret contracts using "premise . . . that fairness includes substantial equivalence in commercial exchanges"); Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts,* 76 NW. U.L. REV. 369, 405 (1981) ("[T]he advantaged party should share through compromise the unbargained for gains and losses caused by unanticipated change. . . . [W]hen unanticipated change imperils the long-term supply contract, the advantaged party should make every reasonable effort to preserve and adjust the relationship and to harmonize conflict."); Summers, *supra* note 12, at 8 (numerous contract doctrines assure probability that both parties will receive their bargained-for benefits under their agreement.).

16 *See infra* notes 89-93 and accompanying text.

17 *See infra* note 154 and accompanying text. *See generally infra* Part II and cases cited therein.

The courts' use of these fairness reasons demonstrates significant judicial flexibility in resolving cessation disputes, and shows that obligations arising from contractual relations are not only the product of the parties' promises, but are to a significant extent the product of interests independent of those promises.[18]

In Part I of this article I discuss the principles and norms of contract cessation. I begin with an analysis of the principle of freedom of contract and its limitations in analyzing cessation problems and then present the fairness norms that supplement freedom of contract.[19] In Part II, I examine the various contexts in which the cessation issue may arise. In the conclusion, I present some brief observations based on the survey in Part II.

I
THE PRINCIPLES AND NORMS OF CONTRACT CESSATION

A. Freedom of Contract and Its Limitations

1. *Express Allocation*

To the extent that the parties have clearly assigned the right of cessation, courts generally will enforce the agreement.[20] For example, terminations based on a franchisee's failure to satisfy an expressly stated minimum sales volume,[21] on a seller's failure to deliver conforming goods when the buyer's performance is expressly made conditional on perfect tender,[22] or on the occurrence of an event included in a *force majeure* clause,[23] are generally enforced on the grounds of freedom of contract. This principle holds that freedom of private parties to order their own affairs maximizes their welfare, and that of society.[24]

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18 *See infra* notes 248-55 and accompanying text.

19 Part I also discusses social policy reasons for cessation decisions. *See infra* notes 152-64 and accompanying text.

20 *See, e.g.,* Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53, 61 (W.D. Pa. 1980).

21 *See* Gellhorn, *Limitations on Contract Termination Rights—Franchise Cancellations,* 1967 DUKE L.J. 465, 474 (citing Union Tank Car Co. v. Lindsay Soft Water Corp., 257 F. Supp. 510 (D. Neb. 1966), *aff'd sub nom.,* Heator Distrib. Co. v. Union Tank Car Co., 387 F.2d 477 (8th Cir. 1967)).

22 Although U.C.C. § 2-601 sets forth a perfect tender rule, the significance of the rule is diminished by other sections. *See, e.g.,* U.C.C. §§ 1-203, 1-205, 2-508 (1977).

23 For example, a revolution, war, strike, flood, fire, or other act of God.

24 Professor Speidel, referring to long-term supply contracts, notes that enforcement of the parties' allocation of risks is efficient: "To use the jargon, allocative efficiency is predicted to occur where the seller through consent has been compensated ex ante for assuming a risk which, unfortunately for the seller, materializes as an ex post loss." Speidel, *supra* note 15, at 382 n.60; *see* E. FARNSWORTH, CONTRACTS 21 (1982); *see also* C. FRIED, supra note 5, at 2 (freedom of contract is important example of freedom to dispose of "our rights . . . in our persons, in our labor, and in some definite portion of the world . . . on terms that seem best to us."). Cohen, *supra* note 10, at 575 ("[T]he law of contracts gives expression to and protects the will of the parties, for the will is something inherently worthy of respect.").

Courts have tempered freedom of contract, however, by subjecting express right-of-cessation provisions to the tests of unconscionability and related doctrines.[25] Unconscionability encompasses traditional bargaining process doctrines such as fraud, duress, and the duty to disclose, all of which test the assent of the weaker party.[26] An express provision regarding cessation may be unenforceable, therefore, if procured through bargaining misconduct.[27] In addition, unconscionability applies to cases in which assent is tainted, not by bargaining misconduct, but by the unequal position of the parties.[28] An uneducated consumer who is unable to gain sufficient market information because of lack of resources, for example, may be entitled to a finding of unconscionability when the contract terms are harsh[29] and when the party accused of unconscionability can establish no economic justification for the harmful terms.[30] Small merchants may also be entitled to a finding of unconscionability. For example, a franchisee may avoid a harsh termination clause[31] if the franchisee suffered due to gross inequality of bargaining power.[32]

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25 *See* U.C.C. § 2-302 (1977); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979). Related doctrines include forfeiture, good faith, and public policy.

26 Section 2-302, comment 1, of the U.C.C. indicates that if enforcement of the contract or term would result in "oppression and unfair surprise" it is unconscionable. Oppression could refer to either the bargaining tactics of the party accused of unconscionability or the resulting terms. Leff, *Unconscionability and the Code—The Emperor's New Clause,* 115 U. PA. L. REV. 485, 499 (1967). Similarly, unfair surprise could involve tactics or surprise terms. *Id.* at 499-500. Today, as a result of scholarly analysis followed by the courts, the paradigm case for a finding of unconscionability involves both unfair bargaining tactics ("procedural unconscionability") and unfair terms ("substantive unconscionability"). *See id.*

One propounded strength of unconscionability today is that it enables judges to police agreements without the need to manipulate existing common law and equitable doctrines. *See* Hillman, *supra* note 6, at 2, 16. Despite the common assertion that unconscionability is necessary to avoid manipulation, courts apply unconscionability in many situations in which they could apply existing or developing common law assent doctrines without manipulation. *Id.* at 15-24. In fact, courts could apply these doctrines to virtually all bargaining misconduct situations and thereby contribute to the clarity of the unconscionability inquiry. *See* Hillman, *supra* note 6. The assent doctrines indicate more precisely than procedural unconscionability the factual elements that compel finding a contract or term unenforceable. *Id.* at 21. In addition, the doctrines indicate when both the bargaining process and the resulting terms are significant and when the bargaining process alone compels a finding of unenforceability. *Id.* at 21-22; *see also* Eisenberg, *The Bargain Principle and Its Limits,* 95 HARV. L. REV. 741, 752-54 (1982) (describing new paradigm of unconscionability authorizing review of fairness of contract terms in addition to review of bargaining process).

27 *See, e.g.,* Ashland Oil Inc. v. Donahue, 223 S.E.2d 433, 438 (W. Va. 1976).

28 Hillman, *supra* note 6, at 30-31.

29 *Id.* at 31.

30 *Id.* at 33.

31 For some examples of harsh termination clauses see Gellhorn, *supra* note 21, at 514-15.

32 A franchisor often has a "substantial" bargaining power advantage over the franchisee. *Id.* at 468; *see also* Comment, *"At Will" Franchise Termination and the Abuse of Rights Doctrine: The Maturation of Louisiana Law,* 42 LA. L. REV. 210, 213 (1981). The Comment aptly describes the host of inequalities that the weaker franchisee may suffer. *But see* Jordan, *Unconscionability at the Gas Station,* 62 MINN. L. REV. 813, 856 (1978) (franchisees may enjoy "considerable bargaining power in their own right").

Even absent unequal bargaining position or bargaining misconduct, courts occasionally strike down terms of agreements that "shock the conscience."[33] Although courts are reluctant to overturn express contract provisions in the absence of assent problems, they have intervened on unconscionability and related grounds to ensure some degree of balance in the fruits of the exchange,[34] especially when the party that proposed the suspect term cannot establish any commercial justification for it.[35] Such judicial intervention is prevalent, for example, in cases involving the cessation of performance by a party after the other fails to satisfy an express contractual condition.[36] An express provision permitting termination unless "every brick is in place" in a construction contract, for example, may be unenforceable on a host of grounds including unconscionability and forfeiture.[37] Similarly, courts may bar a franchisor from exercising an onerous termination clause, such as one that permits termination for any reason on short notice.[38] The good faith requirement also constrains the use of suspect clauses. For example, courts may find bad faith where a party that is unharmed by the breach of an express clause uses the breach as a pretext for ceasing performance and entering into a more attractive alternate deal. Courts may grant damages to the other party in such a situation even though that other party's breach technically triggers the contract's right of cancellation.[39]

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33 Hillman, *supra* note 6, at 26-27.

34 *See, e.g.,* Campbell Soup Co. v. Wentz, 172 F.2d 80, 83 (3d Cir. 1948) (contract "too hard a bargain and too one-sided" to enforce).

35 *See, e.g.,* Bank of Ind., Nat'l Ass'n v. Holyfield, 476 F. Supp. 104, 111 (S.D. Miss. 1979); *see also* Hillman, *supra* note 6, at 33-34 (arguing that courts should evaluate contract terms in context of commercial setting in which they were made).

36 *See, e.g.,* Baker v. Ratzlaff, 1 Kan. App. 2d 285, 564 P.2d 153 (1977); Holiday Inns of Am., Inc. v. Knight, 70 Cal. 2d 327, 450 P.2d 42 (1969).

37 *See, e.g.,* 3A A. CORBIN, CORBIN ON CONTRACTS § 720 (1963) (time of the essence provisions in building contract); *see also* Baker v. Ratzlaff, 1 Kan. App. 2d 285, 564 P.2d 153 (1977) (clause requiring buyer's immediate payment on delivery without notice of request would be unconscionable).

38 *See, e.g.,* Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 294 A.2d 253 (Ch. Div. 1972), *aff'd,* 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied,* 415 U.S. 920 (1974).

39 *See* Baker v. Ratzlaff, 1 Kan. App. 2d 285, 564 P.2d 153 (1977); *see also* Speidel, *supra* note 15, at 411 n.176 ("A classic example of bad faith is where a buyer rejects a not quite perfect tender by a seller because he is disenchanted with the overall bargain rather than dissatisfied with the seller's performance."); Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code,* 54 VA. L. REV. 195, 249-50 (1968) (rejection of goods ostensibly for nonperfect tender, but in reality to take advantage of market conditions is "bad faith" rejection).

Insistence on the performance of onerous express provisions of contracts has been recognized as bad faith in cases involving the U.S. government's treaties with Native Americans. *See, e.g.,* Worcester v. Georgia, 31 U.S. 515 (1832) (involving United States government's treaties with Cherokee Indians).

2. *Implied Allocation*

Instead of exhibiting clarity, the parties' cessation approach may be obfuscated for many reasons. The drafters may have been incompetent or in a hurry or may have minimized the problem. Or they may have chosen to draft generally to avoid bickering or even to avoid losing the deal.[40] The drafters also may have employed words that are too elastic.[41]

When a cessation right is not clearly expressed for any of these (or other) reasons, courts typically examine contractual language and surrounding circumstances in an effort to ascertain the intention of the parties. In some cases this evidence is sufficiently strong for a court to conclude that the parties actually intended a particular cessation approach.[42] For example, contractual language, course of dealing, or usage of trade may individually or in combination demonstrate that the parties contemplated a certain minimum standard of performance as a condition precedent to the other party's obligation to perform, even when the contract does not expressly indicate the standard of performance.[43] Similarly, when a contract is silent as to duration, such evidence may demonstrate that the parties contemplated a reasonable duration.[44] Courts will generally enforce such implied-in-fact agreements on cessation subject to the same constraints that are involved in enforcing express terms.

In other cases, the evidence derived from contractual language or surrounding circumstances, although less substantial, may still suggest the probable intentions of the parties on the right of cessation. Recognizing that such evidence is inconclusive as to the parties' actual intentions, a court may present its findings as the constructive or reasonable expectations of the parties.[45] Assume for example that after an increase in the worldwide price of crude oil a domestic oil supplier seeks to terminate an agreement that contains no conditions precedent to the supplier's obligation to perform. If the supplier had performed after

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40 E. FARNSWORTH, *supra* note 24, at 482.

41 *Id.* at 492-95. Of course, the parties also may have failed to foresee a cessation problem. *See infra* notes 65-72 and accompanying text.

42 These are often referred to as implied-in-fact allocations. *See, e.g.,* McKinney v. National Dairy Council, 491 F. Supp. 1108, 1111 (D. Mass. 1980); 407 East 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 23 N.Y.2d 275, 280, 244 N.E.2d 37, 40, 296 N.Y.S.2d 338, 342 (1968).

43 *See, e.g.,* United States v. Wegematic Corp., 360 F.2d 674 (2d Cir. 1966) (seller who had characterized its computer system as "truly revolutionary" held to bear risk of engineering difficulties); Austin Co. v. United States, 314 F.2d 528 (Ct. Cl.), *cert. denied,* 375 U.S. 830 (1963) (that plaintiff contractor voluntarily prepared specifications incorporated in government contract for data-gathering systems implies that contractor will adhere to those specifications).

44 *See, e.g.,* Paramount Lithographic Plate Serv., Inc. v. Hughes Printing Co., 2 Pa. D. & C.3d 677, *aff'd,* 249 Pa. Super. 625, 377 A.2d 1001 (1977).

45 *See* Farnsworth, *supra* note 15, at 876-77.

previous similar price increases, a court may conclude that the parties reasonably expected that the supplier would assume the risk of the particular price increase. Similarly, a court may find that a franchisee reasonably expected that its franchise would not be cancelled arbitrarily as long as it performed satisfactorily, in light of the franchisor's representations to that effect to other similarly situated franchisees.

The reasonable expectations approach holds the parties to a standard of reasonableness by focusing on what a reasonable person would have expected under the circumstances. The approach is justified on freedom of contract grounds as an attempt to enforce the parties' probable intentions,[46] or, at least, what one party should have known the other intended.[47] In many situations, however, the evidence as to the expectations of a reasonable person may be quite unpersuasive.[48]

The implications of contractual silence, for example, are often misleading. A court may reason that a promisor assumed a particular risk because it failed to insist on contractual language to cover that contingency.[49] To illustrate, a court may conclude that a large oil supplier assumed the risk of price increases simply because of the absence of any conditions precedent to the duty to supply oil in the agreement. Although the parties may have allocated the risk of all price rises to the supplier, it may be more reasonable to assume that the parties only intended to allocate the risk of certain expected increases to the supplier and not the risk of unexpected dramatic increases. The oil supplier, one may argue, would have insisted on a higher contract price or exacted other compensation if it had intended to insure the oil supply regardless of the price.[50] To cite another example, a contractor's failure to provide for payment upon substantial performance does not necessarily suggest that the owner is excused from payment unless "every brick is in place."

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46 *See id.* at 877-78.

47 E. FARNSWORTH, *supra* note 24, at 523.

48 *See, e.g.,* Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53, 91 (E.D. Pa. 1980) ("The parties may both be better served by an informed judicial decision based on the known circumstances than by a decision wrenched from words of the contract which were not chosen with a prevision of today's circumstances."); *see also* Dawson, *Economic Duress and the Fair Exchange in French and German Law,* 11 TUL. L. REV. 345 (1937); Farnsworth, *supra* note 15, at 867-68.

49 *See, e.g.,* Lloyd v. Murphy, 25 Cal. 2d 48, 54, 153 P.2d 47, 50 (1944). Professor Farnsworth has pointed out that such an assumption is usually made when the issue involves the restriction of a duty expressed in absolute language. *See* Farnsworth, *supra* note 15, at 886. He adds that silence generally is not interpreted against a party in controversies involving the imposition of a constructive duty on the other party. *Id.*

50 *See* Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. at 70 (supplier only assumed risk of normal price increases); Farnsworth, *supra* note 15, at 885; Speidel, *supra* note 15, at 377-78, 395. Evidence of a supplier's previous performance in the face of price increases is not especially probative of intent if the previous increases were not of the magnitude of the increase under consideration. *See infra* Part II (discussing implication of silence in other cessation contexts).

The failure of a contract to allocate the particular risk, therefore, may be of only marginal relevance to the intentions inquiry.

The foreseeability test has refined the approach of courts to the problem of contractual silence. In particular, courts in cases involving excuse from performance theorize that in the absence of conditioning language the promisor must have intended to assume all foreseeable risks.[51] However, the parties may simply have failed to allocate even foreseeable risks.[52] Conversely, the parties may have intended that the promisor ensure performance by assuming all risks, including unforeseeable ones.[53] Thus, because a party may have assumed risks of which it was unaware, or may purposefully have avoided liability for known risks, the foreseeability approach for determining intention is unreliable and should not alone control the allocation issue.[54]

In addition, courts must confront the difficulty of determining whether a contingency was foreseeable. To some extent all commercial contingencies are foreseeable. The question is better put in terms of *how* foreseeable the occurrence was. Determining the extent of foreseeability, however, necessitates difficult linedrawing and other unrelated factors often can control the determination. For example, one suspects that the degree of harm the party with the performance duty will suffer may "control" the foreseeability issue.[55] In the oil supply problem, if the price increase was sufficiently large that the supplier would suffer great harm if forced to perform, a court may conclude that the price rise was unforeseeable, and hence, that the supplier had not assumed the risk.[56]

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51 *See, e.g.,* Salinger v. General Exch. Ins. Corp., 217 Iowa 560, 250 N.W. 13 (1933); Raner v. Goldberg, 244 N.Y. 438, 155 N.E. 733 (1927). Generally, courts find against the party seeking to terminate when events should have alerted the party to the possibility of a contingency occurring. *See, e.g., In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 517 F. Supp. 440, 454-55 (E.D. Va. 1981); U.C.C. § 2-615(a) (1977).

52 *See infra* notes 68-69 and accompanying text.

53 *See, e.g., In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 517 F. Supp. at 455.

54 Some courts recognize that foreseeability should not control the allocation of the risk. *See, e.g.,* Transatlantic Fin. Corp. v. United States, 363 F.2d at 318; Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. at 76; *see also* Comment, *Contractual Flexibility in a Volatile Economy: Saving U.C.C. Section 2-615 from the Common Law,* 72 Nw. U.L. REV. 1032 (1978); *id.* sources cited at 1037 n.30.

55 *See, e.g.,* Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975); Maple Farms, Inc. v. City School Dist., 76 Misc. 2d 1080, 353 N.Y.S.2d 784 (Sup. Ct. 1974), *aff'd,* 405 N.Y.S.2d 874 (2d Dep't 1978).

56 If the price increase was unforeseeable, the discharge of the supplier does not harm the purchaser because the purchaser has not paid for performance under the prevailing market conditions. Requiring the supplier to deliver would result in an undeserved gain to the purchaser. *See* Speidel, *supra* note 15, at 405. In Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980), the court ordered an equitable price adjustment when the circumstances were foreseeable, but unanticipated. The court further indicated that "severe out of pocket losses" were essential to its decision to grant relief. *Id.* at 92. *See also* Speidel, *Excusable Nonperformance in Sales Contracts: Some Thoughts About Risk Management,* 32 S.C.L. REV. 241, 266 n.73 (1980).

Courts also employ the theory of economic efficiency to establish the reasonable expectations of the parties. This theory asserts that contracting parties allocate risks to maximize their joint welfare.[57] If the oil supplier can ensure a source of supply at a stable price less expensively than the purchaser, for example, one may infer that the parties' intentions were that the risks involved in failing to ensure a source of supply would fall on the supplier. Similarly, one may conclude that parties to a franchise agreement would allocate the risk of a failure of best efforts to the franchisee, which can control its own performance efforts.[58] The efficiency formulation is only of limited help, however, because parties do not always allocate risks efficiently.[59] For example, a party may be willing to sacrifice gain in the short run, if it expects that immediate concessions will result in greater gain in future agreements.[60] In addition, employing hindsight to ascertain the efficient allocation will be problematic in many instances.[61]

Judges also rely on their assumptions about how parties bargaining fairly would allocate risks in ascertaining the parties' reasonable expectations. Courts, for example, may excuse the oil supplier from performance after a large unexpected price rise on the theory that parties bargaining fairly and in good faith would not have allocated such an onerous risk to the supplier.[62] By way of further illustration, a contractor may be entitled to payment despite its failure to "put every brick in place," because parties bargaining fairly presumably would not include such a harsh condition precedent to performance. The greater the obfuscation of the parties' intentions on cessation, the more one suspects that the fairness factor controls the "finding" on that issue.[63] When the

57 *See* Speidel, *supra* note 15, at 381-82; *see also* Posner & Rosenfeld, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis,* 6 J. LEGAL STUD. 83, 89-90 (1977); Speidel, *supra* note 15, at 376 n.32, 385, 393-94. *See generally* Horwitz, *Law and Economics: Science or Politics,* 8 HOFSTRA L. REV. 905 (1980).

58 *See* Goetz & Scott, *Principles of Relational Contracts,* 67 VA. L. REV. 1089, 1142-43 (1981). To cite another example, because an offeror can frame the offer clearly he should bear the risk of reasonable reliance when the offer is unclear on the right to revoke. *See* RESTATEMENT (SECOND) OF CONTRACTS § 62 (1979).

59 *See, e.g.,* Goldberg, *Relational Exchange,* 23 AM. BEHAV. SCI. 337, 339 (1980); Speidel, *supra* note 15, at 396-400.

60 *See* Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus,"* 75 NW. U.L. REV. 1018, 1023-25 (1981).

61 *See* Posner & Rosenfeld, *supra* note 57, at 110-11; Speidel, *supra* note 15, at 396. The inquiry requires determining who can best prevent a risk from occurring, and who is the best insurer of unpreventable risks. *See* Posner & Rosenfeld, *supra* note 57, at 90-91.

62 *See* Nora Springs Coop. v. Brandau, 247 N.W.2d 744, 748 (Iowa 1976). The Restatement (Second) of Contracts notes that "[it] is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss. The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract." RESTATEMENT (SECOND) OF CONTRACTS § 265 comment a (1979). For criticism of this approach, see Note, *U.C.C. § 2-615: Excising the Impracticable,* 60 B.U.L. REV. 575, 589 (1980).

63 *See generally* Parev Prods. Co. v. I Rokeach & Sons, Inc. 124 F.2d 147, 149 (2d Cir.

court's view of fairness controls the decision, courts should abandon the intentions construct and articulate more precisely the bases for their decisions.[64]

3. *Gaps*

Instead of incomplete or poor drafting of a provision concerning cessation, the evidence may clearly show that the parties failed to determine the right of cessation at all.[65] Contracting parties may fail to consider and plan for contingencies that will arise because of the limitations of the human mind and imagination in anticipating the future,[66] a problem exacerbated by our complex technological society.[67] The parties may also fail to focus on foreseeable contingencies or, having considered them, may simply dismiss them as unlikely to occur[68] or fail to agree on the proper allocation of their risk.[69] Courts generally abandon the reasonable expectations approach in such cases and attempt, partic-

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1941) ("'Intention of the parties' is a good formula by which to square doctrine with result. That this is true has long been an open secret."); Farnsworth, *supra* note 15, at 877-79.

64 Where the parties' intentions are not clear, courts may apply a rule of law to ascertain the rights of the parties. *See* McKinney v. National Dairy Council, 491 F. Supp. 1108, 1111 (D. Mass. 1980); Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685, 1734 (1976).

65 In Straup v. Times Herald, 283 Pa. Super. 58, 72-73, 423 A.2d 713, 720-21 (1981), for example, the court recognized that in barring the termination of a newspaper distributorship because of the expenditures that were incurred in making the distributorship successful, the court was "judicially creating terms of a contract" and "providing for a contingency not contemplated or discussed by the parties." Nonetheless, the court felt that such a solution was "fair, reasonable and, indeed, necessary under the circumstances of [the] case." *See also* Macneil, *Contracts: Adjustments of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law,* 72 NW. U.L. REV. 854, 874 (1978) ("More or less drastic changes in outside circumstances constantly effect contractual adjustments, however firmly the parties may appear to be holding to their original course."). As Professor Macneil points out, change is a "permanent characteristic of modern technological societies." *Id.* at 889. Professors Goetz and Scott, borrowing terminology from Professor Macneil, use the phrase "relational" contracts to describe agreements in which "the parties are incapable of reducing important terms of the arrangement to well-defined obligations." Goetz & Scott, *supra* note 58, at 1091.

66 *See* Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53, 63 (W.D. Pa. 1980) (difficulty of avoiding "risk of economic changes"); Goetz & Scott, *supra* note 58, at 1090 n.4; Macneil, *The Many Futures of Contracts,* 47 S. CAL. L. REV. 691, 726 (1974).

67 *See* Macneil, *supra* note 66, at 726 ("Even the simplest and clearest promise, supported by conditions most conducive to its performance and backed by the most intense social, economic and legal pressure for performance, is not, at the instant it is made, the same thing as its actual performance in the future."); *see also* Farnsworth, *supra* note 15, at 871-72.

68 *See, e.g.,* Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 318 (D.C. Cir. 1966) ("Foreseeability or even recognition of a risk does not necessarily prove its allocation."); I. MACNEIL, THE NEW SOCIAL CONTRACT 8-9 (1980); Farnsworth, *supra* note 15, at 870-76 (parties may have failed to foresee the foreseeable); Posner & Rosenfeld, *supra* note 57, at 100.

69 *See, e.g.,* Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 318-19 (D.C. Cir. 1966). In *Transatlantic,* the parties neglected to specify the shipping route assuming the ship would sail the customary route through the Suez Canal. At the time of contract, the Canal had already been nationalized; the Egyptians closed the Canal after the ship set sail. The ship altered its route.

ularly as regards unforeseeable contingencies,[70] to predict how the parties would have allocated the risk had they considered the contingency.[71] In adhering too closely to the intention-of-the-parties fiction, however, a court may fail to identify and explain carefully the factors that compel its decision.[72]

4. *Conclusion*

Cases involving excuse doctrines such as impossibility, impracticability, and frustration are a common setting for the discussion of cessa-

70 When the contingency is deemed unforeseeable, courts cannot rely on the parties' intentions to fill contractual gaps because it is clear that the parties had no intentions. *See* Farnsworth, *supra* note 15, at 867.

71 *See, e.g.,* Maple Farms Inc. v. City School Dist., 76 Misc. 2d 1080, 352 N.Y.S.2d 784, 789-90 (1974) (fair to allocate risk to supplier because purpose of contract was to "guard against fluctuation of price"); C. FRIED, *supra* note 5, at 60-61; Farnsworth, *supra* note 15, at 879-80; *see also* Farnsworth, *supra* note 15, at 865 (detailing various approaches of scholars to problem of gaps—e.g., Glanville Williams's description of terms the parties had in mind, terms they would have expressed had issue been raised, and terms implied on basis of fairness, and Professor Corbin's view that implied-in-fact terms are those parties intended, whereas constructive terms are those parties would have intended or that justice would require).

72 *In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 517 F. Supp. 440 (E.D. Va. 1981), is a case in point. Westinghouse had agreed to fuel two Florida Power and Light nuclear steam supply systems and to remove the spent fuel from the reactors. The court found that both parties contemplated that the spent fuel would be reprocessed, from which Westinghouse would recoup between $16 and $19 million. The litigation arose when Westinghouse, after operating the plants for three years, indicated that it could not remove the spent fuel because it could not reach agreement with a reprocessing firm, and when two more years later President Carter foreclosed commercial reprocessing as an option. The court noted that spent fuel had never been commercially reprocessed at the time of the agreement, in spite of both the government's efforts to encourage that approach and the contractual provision binding Westinghouse to remove the spent fuel. Accordingly, the court held that Westinghouse had assumed the risk of *any* difficulties, even an unforeseeable one like President Carter's ban on commercial reprocessing.

Reasons other than the parties' "intentions" may actually have governed the decision in *Westinghouse.* First, concerning the harm to the respective parties from enforcement or cessation of Westinghouse's obligation to remove spent fuel, the court indicated that Florida had already incurred expenditures in excess of $9 million, with future potential costs of $1 million per day for replacement power, whereas Westinghouse had failed to show that it lost money on the " 'package deal' of plant and fuel contracts for Florida." *Id.* at 453. In addition, the court intimated that Westinghouse was willing to accept some loss from the deal because it hoped that the Florida plants would promote its position in the nuclear power industry.

Second, the court noted that Westinghouse had acted unreasonably during negotiations and in its performance of the contract. Evidence suggested that Westinghouse had insufficient knowledge in computing its cost assumptions for the fuel contracts. In addition, the court characterized Westinghouse's attempts to obtain a facility for reprocessing before the presidential ban as "less than zealous." *Id.* at 455. The court found that Westinghouse had not shown that its failure to obtain reprocessing "resulted from causes beyond its reasonable control." *Id.* at 459.

Third, efficiency considerations suggested that the risk that commercial reprocessing facilities would be unavailable should be placed on Westinghouse. The court indicated that Florida had no "expertise in nuclear power," *id.* at 444, and desired a fixed-price contract, whereas Westinghouse had "nuclear knowledge and capability." Westinghouse, therefore, was in a better position to safeguard against increased costs in the removal of the spent fuel. *See also* Farnsworth, *supra* note 15, at 876-81.

tion rights. These cases generally involve the allocation of risk of events or conditions beyond the parties' control.[73] The issue of cessation is, however, common to other situations as well. For example, contract terms together with the overall circumstances may not clearly indicate whether an agreement is terminable at will or for cause, or whether a particular breach entitles the injured party to cease performance.[74] In these and other contexts,[75] a court's decision on cessation will include consideration of the fairness norms that are the subject of the next subsection. As noted above, fairness concerns may also overturn express cessation clauses.[76] Although fairness has no single meaning[77] and in the abstact is too broad to be very useful,[78] the boundaries are definable when the concept is set against the backdrop of the various cessation settings.

B. Supplementing Freedom of Contract: Fairness in Contract Cessation

When the evidence concerning the parties' intentions on cessation is inadequate or the parties had no intentions, or when the enforceability of an express cessation clause is uncertain, courts rely heavily on fairness norms in framing their decision on the propriety of cessation. Generally, courts compare the parties' positions if the contract were performed with their positions if performance were discharged.[79] This approach effectuates at least four fairness norms. This Part begins with an analysis of these fairness norms, followed by a brief observation concerning appropriate remedies when the fairness norms favor enforcement of the contract, and concludes with an examination of the relationship between the fairness norms and other social policy reasons for cessation.

1. *The Fairness Norms*

a. *Comparative Equities.* In comparing the positions of the parties engaged in a cessation dispute, courts typically balance the reliance and expectancy interests of the party seeking performance[80] against the prospective economic harm of the party seeking cessation. This balancing

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73 *See infra* notes 208-37 and accompanying text.

74 *See infra* notes 165-207, 238-47 and accompanying text.

75 *See infra* Part II.

76 *See supra* notes 33-39 and accompanying text.

77 *See* Anderson, *Conflicts of Interest: Efficiency, Fairness and Corporate Structure,* 25 U.C.L.A. L. REV. 738, 745, 746 n.25 (1978).

78 *See, e.g.,* Hillman, *Policing Contract Modifications Under the U.C.C.: Good Faith and the Doctrine of Economic Duress,* 64 IOWA L. REV. 849, 877-78 (1979).

79 *See infra* Part II.

80 For a discussion of the reliance and expectancy interests, see generally Fuller & Perdue, *supra* note 2.

approach sorts out the potential gains and losses in the cessation problem so that courts can properly discern the interests at stake.

The party seeking enforcement of the contract may assert a reliance interest consisting of expenses incurred in anticipation of, or in partial performance of, a contract, or consisting of opportunities foregone upon entering the contract. A franchisee in an agreement of indefinite duration, for example, may expend large sums purchasing franchise equipment and otherwise preparing for performance in addition to foregoing other business opportunities.

Some authorities suggest that reliance consisting of expenditures necessary to performance of the contract should have greater weight in the balancing process than nonessential reliance expenditures[81] or reliance in the form of opportunities foregone.[82] Essential reliance expenditures, such as the purchase of franchise equipment, make the strongest case for relief because they are direct and generally foreseeable. In addition, essential reliance expenditures should result in provable out-of-pocket losses.[83] Although nonessential reliance expenditures should also result in provable out-of-pocket losses, they are more remote. Some of a franchisee's organizational expenses, for example, may not have been essential for performance and, hence, may not have been within the contemplation of the parties at the time of agreement.[84] Foregone opportunities may also be unforeseeable even though they are a direct result of reliance on the contract. In reliance on performance, for example, a franchisee may forego other franchising opportunities of which the franchisor was reasonably unaware. Even if other opportunities were foreseeable, courts may hesitate to consider such reliance because one cannot be sure whether the party seeking enforcement (like the franchisee) would have availed itself of the opportunity or whether that op-

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81 *See, e.g.,* Walker v. Ireton, 221 Kan. 314, 322-23, 559 P.2d 340, 346-47 (1977) (buyer's selling of farm in anticipation of acquiring property held incidental reliance and therefore insufficient to bar assertion of statute of frauds); 3 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 533A, at 809-10 (W. Jaeger 3d ed. 1960). See Fuller & Perdue, *supra* note 2, at 78-79 for a discussion of essential and incidental reliance. Essential reliance expenditures are those actually incurred in performance or necessarily incurred in preparation for performance. Incidental reliance expenditures, on the other hand, are not required for performance or preparation for performance. For example, the purchase by the buyer of Blackacre of special fixtures suitable only for Blackacre is an incidental reliance expenditure. *See also* D. DOBBS, REMEDIES § 12.1, at 790-91 (1973); Hudec, *Restating the "Reliance Interest,"* 67 CORNELL L. REV. 704, 723-28 (1982).

82 *See, e.g.,* Caplan v. Roberts, 506 F.2d 1039 (9th Cir. 1974) (seller permitted to invoke statute of frauds in defending plaintiff buyer's claim for failure to deliver equipment even though buyer would lose expected profits on the planned resale of equipment because buyer had foregone opportunity to purchase equipment elsewhere). *See also* Hudec, *supra* note 81, at 719-21 (discussing reliance in terms of foregone opportunities and out-of-pocket expenditures).

83 *See* Fuller & Perdue, *supra* note 2, at 87.

84 Similarly, special fixtures purchased for Blackacre would normally not be within the contemplation of the parties. *See supra* note 81.

portunity would have been profitable. Despite these distinctions, courts should consider nonessential reliance or reliance in the form of lost opportunities in cessation cases when they are not too remote or speculative.[85]

Generally, in resolving the cessation issue, courts appear to focus more on the magnitude and type of reliance expenditures than on whether they benefit the other party.[86] When cessation is appropriate, however, the restitution interest[87] is often important in the formulation of remedies. When courts discharge a party on excuse grounds, for example, the discharged party must return benefits that were conferred by the other party. Courts typically ignore, however, any reliance expenditures that do not benefit the discharged party.[88]

Courts also consider the gains that the party seeking enforcement could expect from performance of the contract.[89] When the right to cease performance is unclear, however, the parties' expectations are not ascertainable. The expectations of a franchisee in an agreement that contains a termination "for any reason" clause, for example, may vary widely depending on interpretation of the clause. If the clause means that the franchisor can terminate only for performance related reasons, the franchisee would expect certain benefits if performance was satisfactory. If on the other hand, the clause means that the franchisor can terminate arbitrarily, the franchisee would expect those benefits only if the franchisor does not terminate. Thus, if the meaning of the clause is uncertain, the franchisee's expectations necessarily are uncertain as well.

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85 *See* D. DOBBS, *supra* note 81, at 791 (recovery of incidental reliance should be "limited, if at all, [o]n the principles limiting other claims of special damages"). Professor Fuller suggested that expectancy is awarded as "the most effective means of compensating for detrimental reliance," and indicated that such reliance includes "losses involved in foregoing the opportunity to enter other contracts." Fuller & Perdue, *supra* note 2, at 60.

86 *E.g.*, McGinnis Piano & Organ Co. v. Yamaha Int'l Corp., 480 F.2d 474 (8th Cir. 1973); Holiday Inns of Am., Inc. v. Knight, 70 Cal. 2d 327, 450 P.2d 42, 74 Cal. Rptr. 722 (1969); Straup v. Times Herald, 283 Pa. Super. 58, 423 A.2d 713 (1981).

87 *See* Fuller & Perdue, *supra* note 2, at 53-54. Expenditures of a franchisee in readying itself for performance, such as organizational expenses, do not directly benefit the franchisor; the franchise fee and the price paid to the franchisor for equipment are a direct benefit. The latter expenditures are referred to as the restitution interest of the franchisee. See the discussion in Beefy Trail, Inc. v. Beefy King Int'l, Inc., 267 So. 2d 853, 856-57 (Fla. Dist. Ct. App. 1972).

88 *See infra* notes 231-33 and accompanying text.

89 In considering whether an oil company could terminate one of its stations, one court stated that the station owner's "investment *and very livelihood* depend on his remaining within the good graces of Shell's local employees." Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 372, 294 A.2d 253, 261 (1972) (emphasis added), *aff'd*, 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied*, 415 U.S. 920 (1974); *see also* Arnott v. American Oil Co., 609 F.2d 873, 880 (8th Cir. 1979) (in rejecting oil company's right to terminate franchisee, court noted that dealer "was lead to believe that he was entering into a dealership with excellent prospects for an extended period of time"), *cert. denied*, 446 U.S. 918 (1980); Baker v. Ratzlaff, 1 Kan. App. 2d 285, 564 P.2d 153 (1977) (buyer of popcorn entitled to expectancy despite technical breach which seller asserted as grounds for termination); *see also infra* Part II.

A purchaser's right to performance under the contract in the face of large unexpected increases in the cost of its supplier's performance is another example of uncertain expectations.[90]

Courts faced with uncertainty on cessation often consider the gains expected from performance in determining the enforcement right, at least when the expected gains are coupled with material reliance expenditures.[91] Such reliance expenditures are an investment for a future return; if the return is denied, the relying party is harmed by not having invested elsewhere.[92] Even if the court is uncertain whether a party is entitled to the return under the contract, expected gains are, therefore, still relevant to the overall fairness inquiry. Nevertheless, like reliance in the form of lost opportunities, courts ordinarily consider such uncertain gains to be less significant than essential reliance losses in the balancing process.[93]

The courts must balance the reliance interest and the expected gains of the party seeking performance against the expected losses of the party seeking cessation.[94] These losses may consist of the excess cost of performance over the income from the deal, such as when increased costs to a manufacturer of raw materials make performance unprofitable, or when a seller delivers valuable goods under the erroneous impression that they are valueless. Harm may also consist of the depreciation in value of what a party is to receive, such as when the government curtails the anticipated profitable use of a leasehold[95] or when the other party fails to perform satisfactorily.[96] Courts generally have not explicitly considered lost investment opportunity, such as the opportunity of an oil supplier to unload oil on the market after huge price increases, in the balancing process.[97] Because the oil supplier presumably would have the opportunity to invest on the market if it had the right to cease performance, when the parties' position on cessation is unclear, excluding lost investment opportunity in evaluating the fairness of cessation seems unjustified.

The comparative equities analysis is most useful when the interests of one party greatly outweigh those of the other. If, for example, the party urging cessation stands to lose very little if required to perform,

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90 *See supra* note 50 and accompanying text.

91 *See supra* note 89; *infra* note 172. *But see* 3 S. WILLISTON, *supra* note 81, at § 533A (expected gains insufficient to work estoppel of statute of frauds).

92 An investment by a franchisee in "building" a franchise, for example, is made with the expectation of future profits. *See infra* note 173 and accompanying text.

93 *See* Harvey, *Discretionary Justice under the Restatement (Second) of Contracts,* 67 CORNELL L. REV. 666, 678 (1982) (traditionally courts have preferred to protect "capital values" over "income, profits or opportunities").

94 *See infra* Part II.

95 *See infra* notes 208-37 and accompanying text.

96 *See infra* notes 238-47 and accompanying text.

97 *See, e.g.,* Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980).

but the party seeking performance incurred substantial preparation or part-performance costs and reasonably expects a fair return on its investment, the comparative equities favor a decision against cessation. In closer cases, such as when the contract is a losing one for the party urging cessation but, again, the other party has incurred substantial reliance expenses, a court may fall back on the implied-term analysis to decide against the party that it feels should have protected itself by including a term in the contract.[98] If a supplier has promised to perform, courts will hold it to its contractual duty even under exigent circumstances. Similarly, if a contract is silent on duration, courts will deem it terminable-at-will.

When balancing the equities proves inconclusive, perhaps instead courts should adopt a concept of sharing gains and losses. Even when, on balance, cessation seems appropriate, courts should grant relief to a relying party not only for its restitution interest, but also for its other reliance expenditures (but not for lost profits).[99] Alternatively, if performance is to proceed, perhaps the courts should grant a party facing forfeiture an equitable adjustment in the terms of the contract.[100] Sharing has not been a favored remedy in the law, perhaps because of the large amount of discretion it would afford judges. Accordingly, contract law has been slow to accept a sharing approach.[101] As we shall see in Part II, however, modern contract law may be turning away from its traditional aversion to a sharing approach.[102]

Do courts compare equities when confronted with an express cessation clause? Assuming free assent, the balancing analysis is heavily weighted in favor of the party asserting the contract term because of adherence to the principle of freedom of contract.[103] In addition, fairness dictates that if the parties have freely agreed on a cessation ap-

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98 *See supra* notes 49-50 and accompanying text.

99 *But see supra* text accompanying note 88; *infra* notes 231-33 and accompanying text. Professors Posner and Rosenfeld posit a hypothetical involving the sale of a specially manufactured printing machine to a buyer whose premises are destroyed by fire, thereby rendering the machine useless to the buyer. Posner & Rosenfeld, *supra* note 57, at 92-94. The solution according to Posner and Rosenfeld depends on who could best insure against the risk. Alternatively, perhaps the parties should share the loss by compensating the seller for reliance expenditures, but denying a lost profit recovery.

100 *See, e.g.,* Speidel, *supra* note 15, at 404-05; *infra* notes 234-37 and accompanying text; *see also* Note, *supra* note 48, at 596-99.

101 Generally, courts have been unreceptive to a sharing approach, *see, e.g.,* Carroll v. Bowersock, 100 Kan. 270, 274, 164 P. 143, 144 (1917), except when the reliance loss constitutes part payment, *see* 6 A. CORBIN, *supra* note 37, § 1363, at 511, or benefits the other party. For notions of partial excuse and divisibility that mitigate against the all-or-nothing approach, see, for example, E. FARNSWORTH, *supra* note 24, at 702.

102 The resistance to sharing may be easing. *See, e.g.,* RESTATEMENT (SECOND) OF CONTRACTS § 272(2) and comment c (1979); Young, *Half Measures,* 81 COLUM. L. REV. 19, 32 (1981); *see also* Note, *Apportioning Loss After Discharge of a Burdensome Contract: A Statutory Solution,* 69 YALE L.J. 1054 (1960). *But see* E. FARNSWORTH, *supra* note 24, at 705.

103 *See supra* notes 20-39 and accompanying text.

proach, courts should enforce it.[104] Even when the parties have allocated the cessation risk, however, in extreme situations courts may avoid imposing the express term. Courts may rely on the doctrines of unconscionability or forfeiture when exercise of a cessation clause would cause extreme harm to the disadvantaged party, but failure to exercise the clause would not damage the other party.[105] Thus, an express cessation clause is but one factor (albeit a significant one) in the comparative equities analysis.

b. *Harm-Avoidance.* Frequently in cessation litigation, one party's potential out-of-pocket losses from either cessation or continued performance greatly outweigh the prospective losses of the other party.[106] These cases fall into two categories. In the first one, a party seeking to enforce the agreement will suffer a material reliance loss from termination.[107] A franchisee who has made significant expenditures in reliance on a contract of indefinite duration, or a contractor who, prior to breach, has incurred substantial costs in preparation or part performance falls into this category. If the franchisee's performance satisfied industry standards or the contractor's breach was immaterial, continued performance may not harm the other party. In the second category, the party seeking to cease performance will suffer a material out-of-pocket loss by continued performance. A supplier in a long term contract may experience dramatic, unexpected increases in the cost of performance.[108] If the purchaser has not relied on performance, its interest would be limited to the potential gains from the now favorable contract. As we have seen, however, the purchaser may not be entitled to these gains because the supplier may not have agreed to perform under the exigent circumstances.[109]

In each situation, the party facing a material loss is dependent on the other party either to continue performance or to agree to cessation, as the case may be. The increasing willingness of courts to bar cessation or to permit it[110] to avoid material harm demonstrates the special significance of harm-avoidance in cessation analysis and establishes the duty of a contracting party to make performance decisions that avoid severe

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104 *See infra* notes 135-40 and accompanying text.

105 *See supra* notes 33-39 and accompanying text.

106 *See infra* Part II. Professor Speidel criticizes adherence to the "arithmetic of loss" in U.C.C. § 2-615 cases. Speidel, *supra* note 56, at 267.

107 *See infra* notes 165-207 and accompanying text.

108 *See infra* notes 208-37 and accompanying text.

109 *See supra* note 56. On the other hand, it may be equally uncertain whether the supplier is entitled to a discharge under the circumstances. In such situations, courts may favor the supplier because they appear to treat out-of-pocket losses as more worthy of relief than losses to income. *See infra* notes 226-29 and accompanying text.

110 *See infra* notes 167-68, 212-16, 243-47 and accompanying text.

harm to the dependent party.[111] Although contract law has traditionally recognized the parties' unilateral discretion to terminate contracts at will, to insist upon performance after unanticipated events, or to terminate after material breach, courts have significantly restricted that discretion on fairness grounds.[112]

The duty owed to the dependent party is analogous to a fiduciary duty.[113] Fiduciary relationships require close supervision to protect a party from the exploitation that may occur when one party enjoys an advantaged position over the other party.[114] A position of dependency may also develop in situations outside the traditional boundaries of fiduciary relationships whenever one party has a great interest in performance or faces forfeiture from performance.[115]

While fiduciaries must often consider their principals' interests above their own,[116] no such subordination of self-interest is required in the cessation context. Instead, in deciding whether to cease a relationship or to insist on performance a contracting party must balance a duty to the dependent party with its economic self-interest.[117] Within a wide

111 Contracting parties are "joined in a common enterprise" and have the duty to "share unexpected benefits and losses . . . ." C. FRIED, *supra* note 5, at 72; *see also* Raz, Book Review, 95 HARV. L. REV. 916, 933 (1982) ("The purpose of contract law *should* be . . . to protect both the practice of undertaking voluntary obligations and the individuals who rely on that practice.") (emphasis in original).

112 See Part II for illustrations. Discretion does not include the decision whether to breach a contract and pay damages; the party making that decision has the *power* to breach but not the *right*. Even the power of a contracting party to breach and pay damages is circumscribed by the expanding remedy of specific performance. *See, e.g.,* U.C.C. § 2-716(1) (1977).

113 In Arnott v. American Oil Co., 609 F.2d 873, 880-81 (8th Cir. 1979), *cert. denied,* 446 U.S. 953 (1980), the court found that American Oil *owed* a fiduciary duty to Arnott, its franchisee. Most cases have not gone that far, but do, however, indicate that the franchisor's duty is *like* that of a fiduciary. *See* Hewitt, *Good Faith or Unconscionability—Franchisee Remedies for Termination,* 29 BUS. LAW. 227, 234 (1973). The function of fiduciaries "is that of recommending or making decisions of a discretionary nature about the management or investment of the property of others." Anderson, *supra* note 77, at 757; *see also* Brown, *Franchising—A Fiduciary Relationship,* 49 TEX. L. REV. 650 (1971); *cf.* Speidel, *supra* note 15, at 407.

114 *See* authorities cited *supra* note 113. Transactions involving mortgagors and mortgagees, attorneys, executors, joint venturers, and creditors and debtors, for example, are subject to close scrutiny because of the dependent party's economic necessities or because the powerful party enjoys inordinate discretion in the governance of the particular relation. *See* Dawson, *Economic Duress—An Essay in Perspective,* 45 MICH. L. REV. 253, 279-80 (1947) (shift in burden of proof to powerful party is common in such cases); Goetz & Scott, *supra* note 58, at 1126-27 (there exists "special duty" to protect interests of dependent party); Hillman, *supra* note 78, at 894; *cf.* Speidel, *supra* note 15, at 407 ("[I]mposition of ex post bargaining duties . . . protects important relational norms and tends to neutralize the advantaged party's opportunism.").

115 Hillman, *supra* note 78, at 883, 894.

116 *See* Goetz & Scott, *supra* note 58, at 1128-29.

117 To some extent, in a successful contractual relationship the interests of the parties are shared. *See, e.g.,* Arnott v. American Oil Co., 609 F.2d 873, 882-83 (8th Cir. 1979); Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 372, 294 A.2d 253, 261 (1972) (relationship was a "franchise . . . for the marketing of Shell's products, in which both parties have a common

range the parties are free to allocate costs and benefits as they desire, and legitimate bargaining power may entitle one of the parties to a larger share of the fruits of the contract.[118]

Intervention therefore is least appropriate when the projected harm to the dependent party results from a clearly allocated risk.[119] Even when risk allocation is clear, however, the prospect of severe harm to a party may override the justification of freedom of contract.[120] When risk allocation is unclear, the harm-avoidance norm protects each party from inordinate loss resulting from the exchange in the absence of countervailing harm to the other party.[121] Absent substantial loss from cessation, therefore, a party may not insist on performance of a contract in which the other party will incur severe costs. Similarly, a party that will suffer no substantial harm by performing cannot cease performance if the other party will suffer material harm as a result. For both explicit and ambiguous cessation agreements one cannot delineate precisely the magnitude of harm sufficient to trigger a protective court response. Generally, the courts attempt to do what is reasonable under the circumstances. Constructs such as materiality, substantiality, forfeiture, foundation, and essence of the deal, are all efforts to determine whether keeping the deal together or calling it off is "more comfortable to justice."[122]

In some cases, the analysis is more difficult because the prospective material harm to each party is very similar in magnitude. For example, a franchisee may have expended large sums in preparation, but the

interest and profit from the activities of the other"), *aff'd,* 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied,* 415 U.S. 920 (1974); *see also* C. FRIED, *supra* note 5, at 69-73. U.C.C. § 2-615, comment 6, provides: "In situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of 'excuse' or 'no excuse,' adjustment under the various provisions of this Article is necessary, especially the sections on good faith, on insecurity . . . ." *See also* GOLDBERG, RELATIONAL EXCHANGE 337, 339 (1980) (opportunism has been defined as "tak[ing] advantage of the other's vulnerability . . . engag[ing] in strategic behavior, or . . . follow[ing ones'] own interests at the expense of the other party"); Speidel, *supra* note 15, at 408-09 n.168.

118 Anderson, *supra* note 77, at 746 n.25 ("[T]he legal test of fairness is the result which would be obtained in an arms' length bargain between a willing buyer and a willing seller with roughly equal bargaining power."). *But see* Gellhorn, *supra* note 21, at 513 ("[A] condition is obviously unfair if all the risks are borne by one party while the benefits go to the other.").

119 Conversely, when harm results from a risk that was *not* clearly allocated, gains and losses are "undeserved." Speidel, *supra* note 15, at 405.

120 *See supra* notes 33-39; *infra* notes 238-47 and accompanying text.

121 The comparative-equities and harm-avoidance norms are very similar. Unlike the comparative-equities norm, however, the harm-avoidance norm focuses primarily on out-of-pocket losses.

122 RESTATEMENT OF CONTRACTS § 275 comment a (1932) (material breach); *see also* 6 A. CORBIN, *supra* note 37, § 1322, at 327; I. MACNEIL, *supra* note 68, at 52 (solidarity norm); Hillman, *Keeping the Deal Together after Material Breach—Common Law Mitigation Rules, The U.C.C., and The Restatement (Second) of Contracts,* 47 U. COLO. L. REV. 553 (1976); *infra* note 155 and accompanying text.

franchisor may be reluctant to continue performance because of adverse market conditions. When the parties' agreement on cessation is clear, it should control because the harm-avoidance approach is inconclusive and, therefore, offers little guidance. When the parties' approach to cessation is unclear or they did not consider cessation, however, they should share the losses. Because the parties, joined in a common venture, did not allocate the risk of the particular circumstances (or, at least, their intentions are not cognizable), there is little reason to assign the entire loss to one party.[123] Only recently have courts begun to expressly adopt such a sharing approach.[124]

c. *Reasonableness.* Not all cases involving material harm restrict the right to cease performance or the right to insist on performance. Courts also consider whether the party suffering harm behaved reasonably. If the harm suffered by a party was the result of that party's own unreasonable conduct, courts discount the harm in the balancing process.[125] The failure of a franchisee to satisfy a general standard of performance in the trade because of managerial incompetence, for example, may entitle the franchisor to terminate the relationship despite the franchisee's material reliance loss.[126] On the other hand, unavoidable temporary performance failures that are easily rectifiable, may not establish grounds for termination. Similarly, a court's decision on a contractor's repudiation of its bid because of a mistake, may depend on the contractor's standard of care in submitting the bid.[127]

Generally, a reasonableness test involves measuring conduct against that of similarly situated parties, or barring such evidence, against general community standards.[128] Sometimes the test is more specific. The "reasonableness" inquiry may include examining which party was in the best position to provide against a risk.[129] In the oil supply problem, for example, a court might allocate the risk to the party that was in the

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123 *See* Hudec, *supra* note 81, at 716.

124 *See supra* notes 99-102 and accompanying text; *infra* notes 234-37 and accompanying text.

125 *See, e.g.,* 6 A. CORBIN, *supra* note 37, § 1323; Posner & Rosenfeld, *supra* note 57, at 98.

126 Professor Gellhorn discusses an example in which a franchisee's sales are "substantially below the average dealer's performance in his region—for example . . . twenty-five per cent below a reasonable quota . . . ." Gellhorn, *supra* note 21, at 515.

127 *See, e.g.,* Kenneth E. Curran, Inc. v. State, 106 N.H. 558, 215 A.2d 702 (1965) (requiring only ordinary care in preparation of bid); James T. Taylor & Son, Inc. v. Arlington Ind. School Dist., 160 Tex. 617, 335 S.W.2d 371 (1960) (requiring only lack of carelessness that violates positive duty).

128 *See, e.g., supra* note 126 and accompanying text.

129 *See, e.g.,* Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129, 140 (N.D. Iowa 1978), *rev'd on other grounds,* 603 F.2d 1301 (8th Cir. 1979), *cert. denied,* 445 U.S. 911 (1980); Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721, 728 (Ct. App. Mo.), *cert. denied,* 444 U.S. 865 (1979); Canadian Indus. Alcohol Co. v. Dunbar Molasses Co., 258 N.Y. 194, 199, 179 N.E. 383, 384 (1932).

best position to assure a source of supply.[130] Such an allocation is fair, the argument goes, because the "efficient" risk bearer reasonably should have taken action to protect itself; forcing the other party to bear the loss when the risk materializes would be inequitable.[131] This element of reasonableness is only helpful, of course, when the court can identify the efficient risk bearer.[132] In addition, if it is clear that the parties did not actually allocate a particular risk and that neither party had reasonable expectations about who would assume the risk, one must question whether the materialized risk should be foisted on a party simply because that party can bear the risk most efficiently.[133] One could argue that if the risk had been allocated, the more efficient risk bearer would have demanded further compensation, especially when the risk involved severe losses.[134]

d. *Reciprocity.*[135] Discussion by courts of lost profits due to cessation and their subsequent award of expectancy damages[136] demonstrates the importance of the reciprocity norm. The reciprocity norm dictates that each party should enjoy the fruits of an exchange in roughly equal balance.[137] It does not mean that each party must enjoy equal benefits from the performance of a contract, but rather that within the parameters of the parties' bargain each party is entitled to its quid pro quo. Thus, when the contract clearly does not grant a party the right to cease performance, fairness, as well as freedom of contact, may compel performance. For example, in an employment contract for a certain unexpired term the employer may not terminate an employee who has

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130 *See, e.g., Canadian Indus. Alcohol,* 258 N.Y. at 199, 179 N.E. at 384; Joskow, *Commercial Impossibility, The Uranium Market and the Westinghouse Case,* 6 J. LEGAL STUD. 119, 153-62 (1977). A court may also consider who was in the best position to insure against a risk. *E.g.,* Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 319 (D.C. Cir. 1966).

131 *See, e.g.,* Speidel, *supra* note 15, at 393 n.117.

132 Transatlantic Fin. Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966), addressed the question of who was in the best position to insure against the risk of the Suez Canal closing; nevertheless, one suspects that the case was actually decided on the basis of the relatively small additional costs involved:

> The only factor operating here in appellant's favor is the added expense, allegedly \$43,972.00 above and beyond the contract price of \$305,842.92, of extending a 10,000 mile voyage by approximately 3,000 miles . . . . [T]o justify relief there must be more of a variation . . . than is present in this case.

Id. at 319; *see also* Speidel, *supra* note 15, at 397-400, 420.

133 *See* Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 365 Mass. 122, 129, 310 N.E.2d 363, 367 (1974); Speidel, *supra* note 15, at 397-98.

134 *Mishara Constr. Co.,* 365 Mass. at 129, 310 N.E.2d at 367; Speidel, *supra* note 15, at 397-98.

135 This norm is also sometimes referred to as the principle of "subtantial equivalency of exchange." *See, e.g.,* Farnsworth, *supra* note 15, at 878-81.

136 *See supra* notes 89-93 and accompanying text; *infra* notes 144-51; *infra* Part II.

137 For application of a similar standard to franchise termination, see Gellhorn, *supra* note 21, at 517-18; *see also* U.C.C. § 2-306 (1977) ("unreasonably disproportionate" test in requirements and output contracts); I. MACNEIL, *supra* note 68, at 46-47.

performed satisfactorily, or in a supply contract, the supplier must perform if he has expressly promised to perform under the particular exigent circumstances. Conversely, when a party clearly has the right to cease performance, such as when an employee has failed to satisfy a material condition precedent to the employer's obligation to perform, or when a contract expressly excuses the supplier's performance under the circumstances, fairness may deny further enforcement of the contract.[138]

Even when the right of cessation is unclear and gains are uncertain, courts may consider such gains in the fairness equation.[139] For example, if a franchisor's decision to cease performance operates to the detriment of the franchisee's expected (albeit uncertain) gains, courts may deny the right of cessation, all other things being equal.[140]

2. *A Word About Remedies*

When the court decides in favor of the party seeking performance, it must then fashion an appropriate remedy. If the court overturns an express cessation clause, it generally grants expectancy, on the theory that, after excising the offending clause, it can enforce the remainder of the contract.[141] If the parties' position on cessation is unclear, however, the remedy should reflect the loss suffered.[142] Thus, if the fairness considerations emphasize the reliance losses, the reliance measure of recovery is appropriate. If the court also emphasizes expected gains from performance, the court should award an expectancy recovery (which necessarily includes essential reliance).[143] Some courts unmindful of this consideration, however, have awarded an expectancy recovery even though their focus was on a reliance loss. For example, although a court emphasizes a franchisee's significant reliance expenditures, it may award lost profits in addition.[144] In some of these cases, the degree of reliance may persuade the court that the parties must have agreed to bar cessation because no "reasonable" party would have otherwise relied;[145]

138 In such situations, the fairness norm of reciprocity is distinguishable from the principle of freedom of contract, which dictates the same result. *See supra* notes 20-39 and accompanying text.

139 *See supra* notes 91-92 and accompanying text.

140 *See infra* notes 170-73 and accompanying text. *See also* Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (implied contract right to job security in employment relationship); Fortune v. National Cash Register, 373 Mass. 96, 364 N.E.2d 1251 (1977) (entitlement of employee to bonuses).

141 *See, e.g.,* U.C.C. § 2-302(1) (1977) (unconscionability permits court to excise offending term and enforce remainder of contract).

142 *See generally* D. DOBBS, *supra* note 81, at 3-4 ("The remedy is merely the means of carrying into effect a substantive principle or policy.").

143 *See* Fuller & Perdue, *supra* note 2, at 66-71.

144 *See infra* notes 170-73 and accompanying text. Section 90 of the Restatement (Second) of Contracts resolves a similar problem by permitting courts to limit the plaintiff to reliance damages in promissory estoppel cases.

145 *See, e.g.,* Jack's Cookie Co. v. Brooks, 227 F.2d 935 (4th Cir. 1955); Shell Oil v. Mari-

courts award expectancy because the party ceasing performance has "breached" the contract.[146]

Courts may award expectancy, however, when the parties' position on cessation is hopelessly unclear and the enforcement decision seems based on a reliance loss.[147] The underlying factor in the courts' decision to enforce may be the dependent party's foregone opportunities which, although too uncertain to be remedied themselves, are nonetheless compelling. Assuming that the contract price did not deviate significantly from the market price, awarding expectancy will mitigate against the harshness of such losses.[148] For example, when the contract price approximates the value of an employee's services, an expectancy award compensates a terminated employee for the lost opportunity of working elsewhere. Another explanation for awarding expectancy, however, simply may be contract law's remedial bias in favor of expectancy.[149] Whatever its merits, contract law has established a remedial theory that awards lost expectancy to injured parties even before they have relied on their contracts.[150] The practice of granting expectancy awards in cessation cases to parties who *have* relied on their contract may reflect the courts' desire to treat such parties at least as well.[151]

3. *Conclusion: Reasons of Fairness and Social Policy*

Courts sometimes justify cessation decisions, at least in part, on the economic and social policies of avoiding economic waste and promoting the economy through contract formation.[152] The complex relationship between policy based and individual fairness reasons is beyond the scope

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nello, 120 N.J. Super. 357, 373-74, 294 A.2d 253, 262 (1972), *aff'd,* 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied,* 415 U.S. 920 (1974); Erskine v. Chevrolet Motors Co., 185 N.C. 479, 117 S.E. 706 (1923).

146 *See* Farnsworth, *Legal Remedies for Breach of Contract,* 70 COLUM. L. REV. 1145, 1147 (1970) (Contract remedies seek to make injured party whole—"to put the promisee in the position in which he would have been had the promise been performed . . . ."). This approach theoretically encourages parties to enter contractual relationships that benefit society through specialization. *See* Hillman, *supra* note 122, at 556-58. Professor Fuller believed that expectancy is the most easily administered standard and that courts prefer it for that reason. He also believed that courts through force of habit apply expectancy more broadly than they should. Fuller & Perdue, *supra* note 2, at 65-66.

147 *See infra* notes 170-73, 241-42 and accompanying text.

148 *See supra* note 85.

149 Professor Fuller thought that reliance might "unlock the impulse to compel men to make good their promises." Fuller & Perdue, *supra* note 2, at 69; *see also supra* note 146.

150 *See* RESTATEMENT (SECOND) OF CONTRACTS § 75 comment a (1979); Farnsworth, *Contracts During the Half Century Between Restatements,* 30 CLEV. ST. L. REV. 371, 372 (1981). *But see* RESTATEMENT (SECOND) OF CONTRACTS § 351(3) (1979); Farnsworth, *supra* at 379-80. Professor Fuller suggested that expectancy awards encourage reliance on contracts. Fuller & Perdue, *supra* note 2, at 62.

151 For example, one might conjecture that the elaborate option contract theory was concocted to justify awarding expectancy to relying offerees. *See, e.g.,* RESTATEMENT (SECOND) OF CONTRACTS § 545 (1979).

152 *See, e.g.,* Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 318-19 (D.C. Cir.

of this paper.[153] Nevertheless, some brief observations are appropriate. First, courts typically stress fairness and reasonableness, whereas goal related reasons are often mentioned only in passing or not at all.[154] Second, even when courts mention goal related reasons, they generally dictate the same result as fairness reasons. Intuitively, waste-avoidance and preserving the benefits of contracting through "keeping the deal together"[155] correspond with protecting the substantial reliance interest of a party on harm-avoidance grounds. Moreover, a consistent application of the fairness norms will encourage contract formation.[156]

The latter observation is illustrated in the context of long-term agreements. Contracting parties' interests diverge on cessation most often under such agreements because a party is likely to incur specialized reliance expenditures[157] and cessation rights are often unclear. For example, a franchisee who expects the franchise to continue as long as it performs satisfactorily, may make significant expenditures preparing for long-term performance.[158] A termination "for any reason" clause may cloud, however, the legitimacy of such expectations.[159] In addition, as the duration of a contract increases, predicting events and providing for unusual circumstances becomes more difficult.[160] Accordingly, a long-term contract is more likely to contain gaps that require fair adjustment. In such situations, the parties are likely to rely upon each other to compromise in filling those gaps.[161] The need to establish an overall harmonious relationship encourages each party to view its interests as coinciding with the interests of its contracting counterpart.[162] In precisely these situations, courts must employ an approach that emphasizes fairness and flexibility to encourage future contract formation. Parties

1966) (efficiency); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (termination of employee "not in the best interest of the economic system . . .").

153 For such a discussion, see Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common Law Justification,* 63 CORNELL L. REV. 707 (1978).

154 *See, e.g.,* Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958); Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 P. 458 (1916); Baker v. Ratzlaff, 1 Kan. App. 2d 285, 564 P.2d 153 (1977); Bak-A-Lum Corp. of Am. v. Alcoa Bldg. Prods., Inc., 69 N.J. 123, 351 A.2d 349 (1976); *see also* Summers, *supra* note 153, at 781 ("[J]udges commonly give rightness reasons as the primary grounds for the decision.").

155 *See supra* note 122 and accompanying text; *infra* note 247 and accompanying text.

156 On the purpose of contract remedies, see *supra* note 146.

157 *See* Speidel, *supra* note 15, at 373-74. Professor Speidel offers the example of the long-term coal supplier who relies on the contract to finance the acquisition of coal reserves.

158 *See, e.g.,* Arnott v. American Oil Co., 609 F.2d 873 (8th Cir. 1979); Clausen & Sons, Inc. v. Theodore Hamm Brewing Co., 395 F.2d 388 (8th Cir. 1968); Straup v. Times Herald, 283 Pa. Super. 58, 423 A.2d 713 (1981); *see also* Hoffman v. Red Owl Stores, 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

159 *See infra* notes 189-98 and accompanying text.

160 Speidel, *supra* note 15, at 373.

161 *See* Anderson, *supra* note 77, at 746 (fiduciary wrongdoing involves "violation of trust and a taking advantage of the victim's own cooperation").

162 *See* I. MACNEIL, *supra* note 68, at 30.

may enter such arrangements, and in fact are encouraged to do so, because they know that contract law is responsive to their needs.[163]

That cessation decisions based on fairness reasons typically produce good social policy does not indicate, however, that the "real" reason for such decisions is the furtherance of social goals. As discussed earlier, courts generally tend to focus on fairness reasons apart from social policy concerns. Unless we presume that judges are in effect concocting an elaborate smokescreen, we should take their opinions at face value.[164]

II
Cessation in Context

In this section, I shall demonstrate how courts have applied the principles and norms isolated in Part I to cessation disputes that traditionally have been viewed as demanding separate analytical approaches.

A. Termination of Contracts of Indefinite Duration

1. *Generally*

At common law, parties could terminate contracts of indefinite duration without cause upon giving of reasonable notice.[165] This rule was grounded in the freedom-of-contract view that contracting parties should not be liable beyond their express obligation.[166] Today, however, courts increasingly have restricted termination rights when the contract is silent on duration or contains an ambiguous termination clause, or in some cases, even when the parties have included a clear termination clause.[167] Courts thereby protect the terminated party from

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163 Most agreements today may be "relational." *See* I. Macneil, *supra* note 68, at 31; Anderson, *supra* note 77, at 755 ("Transactions between merchants . . . characteristically involve a continuing relationship in which both parties depend on each other to perform in good faith.").

164 *See* Summers, *supra* note 153, at 781.

165 *See* 1A A. Corbin, *supra* note 37, § 96, at 413; Gellhorn, *supra* note 21, at 473, 479; Goetz & Scott, *supra* note 58, at 1135; *see, e.g.,* McGinnis Piano & Organ Co. v. Yamaha Int'l Corp., 480 F.2d 474, 479 (8th Cir. 1973); Odell v. Humble Oil & Ref. Co., 201 F.2d 123 (10th Cir.), *cert. denied,* 345 U.S. 941 (1953); Rogers v. IBM, 500 F. Supp. 867, 869 (W.D. Pa. 1980). Professor Macneil suggests that the termination-at-will rule was an attempt to turn "employment into a short-term commodity" in order to implement "discreteness" in transactions. Macneil, *supra* note 65, at 863.

166 *See* Gellhorn, *supra* note 21, at 468.

167 *See, e.g.,* Randolph v. New England Mut. Life Ins. Co., 526 F.2d 1383 (6th Cir. 1975); deTreville v. Outboard Marine Corp., 439 F.2d 1099 (4th Cir. 1971); Tele-Controls, Inc. v. Ford Indus., Inc., 388 F.2d 48 (7th Cir. 1967); McKinney v. National Dairy Council, 491 F. Supp. 1108, 1121-23 (D. Mass. 1980); Baker v. Ratzlaff, 1 Kan. App. 2d 285, 564 P.2d 153 (1977); Atlantic Richfield Co. v. Razumic, 480 Pa. 366, 390 A.2d 736 (1978); Seegmiller v. Western Men, Inc., 20 Utah 2d 352, 437 P.2d 892 (1968); John W. Lodge Dist. Co. v. Texaco Inc., 245 S.E.2d 157 (W. Va. 1978); Ashland Oil, Inc. v. Donahue, 223 S.E.2d 433 (W. Va. 1976).

For a catalogue of statutory protection, see State Business Franchise Disclosure and Relationship Law (CCH) ¶ 301-401 (1978); *see also* Automobile Dealers' Day In Court substantial harm and, in addition, often ensure the anticipated gains from performance.[168]

In the franchise termination area,[169] for example, some courts have held that the termination of a franchise agreement of indefinite duration is wrongful when the franchisee has not had a reasonable opportunity to recoup its investment.[170] Recoupment may include not only reliance expenditures, but also expected profits.[171] Courts generally award such profits only when they find an "implied" reasonable duration clause in the contract. Often, however, courts base their inference of a reasonable

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Act, 15 U.S.C. §§ 1221-1225 (1976). *But see* U.C.C. § 2-309(2), (3) (1977) (contracts of indefinite duration may be terminated at any time). For a further listing of court decisions, see Gellhorn, *supra* note 21, at 478-521; Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith,* 93 HARV. L. REV. 1816 (1980); Weiss, *State by State: Chipping Away at Employment At-Will,* Nat'l L.J., Jan. 18, 1982, at 21, col. 1; *see also* Macneil, *supra* note 65, at 882-83 ("Thus, interstitially and gradually, increasingly tight limits are being imposed on the general principle that parties may plan for unilateral termination of contractual relations and that the courts will effectuate their planning.").

168 In the franchise area, for example, the right of termination generally is restricted when a party has invested resources in the enterprise which may have little value "when divorced from the franchise." Gellhorn, *supra* note 21, at 467, 479-83. Franchisees generally are entitled to "recoup" their investment. Clausen & Sons Inc. v. Theodore Hamm Brewing Co., 395 F.2d 388 (8th Cir. 1968) (13 years may be reasonable to recoup investment); *see also* Straup v. Times Herald, 283 Pa. Super. 58, 73-74, 423 A.2d 713, 720-21 (1981).

In 1967, when Professor Gellhorn wrote his insightful article on franchise termination, courts afforded protection to terminated franchisees in only a minority of cases. Gellhorn, *supra* note 21, at 480, 482-83; Hewitt, *supra* note 113. The more recent cases, with some exceptions, suggest a trend toward greater protection. *See, e.g.,* Arnott v. American Oil Co., 609 F.2d 873 (8th Cir. 1979); Atlantic Richfield Co. v. Razumic, 480 Pa. 366, 390 A.2d 736 (1978); Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 294 A.2d 253 (1972), *aff'd,* 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied,* 415 U.S. 920 (1974) (express termination clause unconscionable); Goetz & Scott, *supra* note 58, at 1137 n.112, 1138 n.116; Macneil, *supra* note 65, at 881-82. *But see* Brattleboro Auto Sales Inc. v. Subaru of New England, Inc., 633 F.2d 649 (2d Cir. 1980); Corensweet v. Amana Refrigeration, Inc., 594 F.2d 129 (8th Cir.), *cert. denied,* 444 U.S. 938 (1979); Zapatha v. Dairy Mart, Inc., 381 Mass. 284, 408 N.E.2d 1370 (1980).

Employees are also protected increasingly against at-will termination. *See, e.g.,* McKinney v. National Dairy Council, 491 F. Supp. 1108 (D. Mass. 1980) (public policy against firing on basis of age); Murg & Scharman, *Employment At Will: Do Exceptions Overwhelm The Rule,* 28 B.C.L. REV. 329, 358-61 (1982). The remedy for such employees is apparently expectancy. *See, e.g.,* Jack's Cookie Co. v. Brooks, 227 F.2d 935 (4th Cir. 1955), *cert. denied,* 351 U.S. 908 (1956).

169 Franchising has become a major means of commerce in America. In 1977 gross sales by franchisees were estimated to be over one-third of all retail sales. U.S. BUREAU OF DOMESTIC COMMERCE, FRANCHISING IN THE ECONOMY, 1975-77 (1977).

170 *See supra* note 168; *see, e.g.,* Lockewill, Inc. v. United States Shoe Corp., 547 F.2d 1024 (8th Cir. 1976), *cert. denied,* 431 U.S. 956 (1977); McGinnis Piano & Organ Co. v. Yamaha Int'l Corp., 480 F.2d 474 (8th Cir. 1973).

171 Some courts have limited the recovery to reliance loss. *See, e.g.,* McGinnis Piano & Organ Co. v. Yamaha Int'l Corp., 480 F.2d 474 (8th Cir. 1973); Ag-Chem Equip. Co. v. Hahn, Inc., 480 F.2d 482 (8th Cir. 1973). Others appear to permit a lost profits recovery. *See, e.g.,* Connelly v. Venus Food, Inc., 17 Cal. App. 2d 582, 345 P.2d 117 (1959); Des Moines Blue Ribbon Distrib., Inc. v. Drewrys Ltd., 129 N.W.2d 731 (Iowa 1964); Bak-A-Lum Corp. of Am. v. Alcoa Bldg. Prods., Inc., 69 N.J. 123, 351 A.2d 349 (1976); General Tire & Rubber Co. v. Distributors, Inc., 253 N.C. 459, 472, 117 S.E.2d 479, 489 (1960).

duration clause on the desire to protect the franchisee's interests and not on concrete evidence of the parties' intentions.[172] These interests include expected profits that, but for the termination, would have resulted from the franchisee's investment in "building the franchise."[173] Courts also consider the terminating party's interests in termination-at-will cases. Thus, if the terminated party's performance fails to satisfy a standard established in the trade or the contract, courts generally permit termination.[174]

Although courts have employed various constructs to restrict termination-at-will of contracts of indefinite duration,[175] they have focused considerable attention on the applicability of good faith and unconscionability.[176] Accordingly, the discussion turns to an analysis of these two constructs.

2. *Good Faith Termination*

The modern good faith performance obligation is codified in section 1-203 of the Uniform Commercial Code,[177] and is increasingly invoked in case decisions outside of the Code.[178] One commentator has

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172 *See, e.g.,* Bak-A-Lum Corp. of Am. v. Aloca Bldg. Prods. Inc., 69 N.J. 123, 351 A.2d 349 (1976); General Tire & Rubber Co. v. Distributors, Inc., 253 N.C. 459, 117 S.E.2d 479 (1960); Erskine v. Chevrolet Motors Co., 185 N.C. 479, 117 S.E. 706 (1923).

Employment termination cases also reflect the courts' desire to protect the terminated employee. *See, e.g.,* Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980).

173 In McGinnis Piano & Organ Co. v. Yamaha Int'l Corp., 480 F.2d 474, 480 (8th Cir. 1973), however, the court emphasized that the investment by the franchisee in "building the franchise" was sufficient to submit the question of the duration of the franchise to the jury, yet refused to award lost profits that would be the direct result of the investment. *See also supra* notes 141-51 and accompanying text. For a discussion of the proper interests to be protected, see *supra* notes 80-94 and accompanying text.

174 *See, e.g.,* Tele-Controls, Inc. v. Ford Indus., Inc., 388 F.2d 48 (7th Cir. 1967); Rogers v. IBM, 500 F. Supp. 867 (W.D. Pa. 1980); Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 378-85, 294 A.2d 253, 264-68 (1972), *aff'd,* 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied,* 415 U.S. 920 (1974); Seegmiller v. Western Men, Inc., 20 Utah 2d 352, 437 P.2d 892 (1968).

175 *See* Murg & Scharman, *supra* note 168, at 355-72.

176 On good faith, see Murg & Scharman, *supra* note 168, at 361-67; *see also* Randolph v. New England Mut. Life Ins. Co., 526 F.2d 1383, 1386 (6th Cir. 1975); deTreveille v. Outboard Marine Corp., 439 F.2d 1099 (4th Cir. 1971); Tele-Controls, Inc. v. Ford Indus., Inc., 388 F.2d 48 (7th Cir. 1967); Pardee Oil Co. v. Phillips Petroleum Co., 320 A.2d 769 (Del. Ch. 1974); Shell Oil Co. v. Marinello, 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied,* 415 U.S. 920 (1974); Sinkoff Beverage Co. v. Joseph Schlitz Brewing Co., 51 Misc. 2d 446, 273 N.Y.S.2d 364 (Sup. Ct. 1966); Ashland Oil, Inc. v. Donahue, 223 S.E.2d 433, (W. Va. 1976). On unconscionability, see Gellhorn, *supra* note 21, at 490-93; Hewitt, *supra* note 113.

177 U.C.C. § 1-203 provides: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

178 For a discussion of the good faith requirement under the U.C.C., see generally Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code,* 67 IOWA L. REV. 1 (1981) [hereinafter cited as Burton, *Good Faith Performance*]; Summers, *supra* note 39. For a discussion of the common law duty of good faith performance, see Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith,* 94 HARV. L. REV. 369, 370-72, 379-

characterized the obligation as "resulting in an implied term . . . requiring cooperation on the part of one party to the contract so that another party will not be deprived of his reasonable expectations."[179] Notwithstanding open-ended contract language, if a promisor performs in a manner that contradicts the promisee's reasonable expectations, the performance is in bad faith.[180] If, for example, a franchisee's reasonable expectations are that its franchisor will not terminate a franchise except for cause, a termination based on the franchisor's feigned dissatisfaction would constitute bad faith.[181]

The good faith performance principle, which involves determining the reasonable expectations of the parties, is merely an abstraction for the contract interpretation process traced in Part I.[182] Courts engage in the identical process of analysis whether they frame the issue in terms of good faith performance or contract interpretation.[183] In good faith performance cases, courts must consider contractual language and the surrounding circumstances, including an estimation of how reasonable parties, bargaining fairly, would allocate risks[184] to determine the parties' reasonable expectations.[185] This fairness inquiry expands the good faith issue to include the norms described in Part I.[186] If the parties clearly have not bargained about a particular risk, the courts cannot rely on the expectations approach for deciding the good faith issue[187] and instead apply the fairness norms to resolve the issue.[188]

Analysis of a concrete case will help to clarify the application of good faith termination. Assume a franchise agreement permits termina-

80, 395-402 (1980) [hereinafter cited as Burton, *Breach of Contract*]; Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization,* 67 CORNELL L. REV. 810 (1982).

179 Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code,* 30 U. CHI. L. REV. 666, 669 (1963).

180 *See* Burton, *Breach of Contract, supra* note 178, at 386. The relevant inquiry, according to Professor Burton, is whether the promisor exercised its discretion to "recapture a foregone opportunity." *Id.* at 391-92.

181 *See infra* notes 189-98 and accompanying text.

182 *See supra* notes 42-72 and accompanying text.

183 *See id.*

184 " 'Reasonable' parties do not merely seek to accomplish rational objectives; they do so constrained by norms of fairness and honesty." C. FRIED, *supra* note 5, at 73. The Restatement (Second) of Contracts recognizes "evasion of the spirit of the bargain" as one type of bad faith. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 comment d (1979).

185 McKinney v. National Dairy Council, 491 F. Supp. 1108, 1118 (D. Mass. 1980); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251, 1256 (1977).

186 *See supra* Part I(B); *see also* Farnsworth, *supra* note 15, at 877-79; Farnsworth, *supra* note 179, at 671 ("Clearly good faith performance can be measured by an objective standard based on the decency, fairness or reasonableness of the community, commercial or otherwise, of which one is a member.").

187 *See* Burton, *Good Faith Performance, supra* note 178, at 29; *accord* Farnsworth, *supra* note 15, at 867.

188 *See infra* notes 197-98 and accompanying text.

tion "for any reason."[189] Suppose further that the franchisor, because of animosity between the presidents of the two companies,[190] terminates the relationship with the franchisee before the franchisee was able to recoup its investment of over $1.5 million.[191] Finally, suppose that the franchisee's performance satisfied all objective criteria for reasonable performance.[192] A termination that belies the reasonable expectations of the franchisee would constitute bad faith. Because the termination "for any reason" clause is probative of those expectations, a court must grapple with the clause in reaching its decision. The parties may have intended the word "reason" to mean a performance related reason and, therefore, termination would be permitted only for "cause."[193] On the other hand, the parties may have intended the "for any reason" language to encompass even ill will terminations.[194] Still another possibil-

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189 *See, e.g.,* Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129, 134 (5th Cir. 1979). *See generally* Gellhorn, *supra* note 21.

190 The claim that termination was based on ill will is often made. *See* Gellhorn, *supra* note 21, at 467.

191 These are the essential facts of Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129 (5th Cir. 1979). Corenswet was the exclusive distributor of certain home appliances manufactured by Amana. The agreement between Corenswet and Amana contained a termination clause that permitted termination by either party " 'at any time for any reason' " on ten days' notice. *Id.* at 132. Corenswet had spent over $1.5 million developing the market for Amana products within its territory and had apparently lost money for over five years and still showed an overall loss. Brief for Appellant at 28, *Corenswet,* 594 F.2d 129 (5th Cir. 1979). The court found that Corenswet had, in fact, "developed an important new market" for Amana products. *Id.*

192 In *Corenswet,* for example, the evidence suggested that Amana representatives were satisfied with Corenswet's performance: "Over the seven and one-half-year period, Amana representatives repeatedly praised Corenswet for its performance." 594 F.2d at 132.

193 The district court in *Corenswet* concluded that Amana had acted arbitrarily in deciding to terminate Corenswet. The court based its finding on "ample evidence in the record" supporting the conclusion that the real reason Amana sought to terminate Corenswet's distributorship was the "animosity" Amana's president felt toward the president of Corenswet's parent corporation. *Id.* at 133. The court enjoined Amana from terminating, construed the termination " 'for any reason' " clause in the agreement to mean " 'for some reason, not for no reason,' " and held alternatively that Amana's termination was in bad faith in violation of U.C.C. § 2-103. *Id.*

In Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 373-74, 294 A.2d 253, 262 (1972), *aff'd,* 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied,* 415 U.S. 920 (1974) the court stated: "Surely no person would make the kind of investment in money, time and effort as did Marinello without the reasonable expectation that if he substantially performed his obligations to Shell, the latter would in turn continue to renew his lease and dealership."

194 The Fifth Circuit reversed the district court in *Corenswet* stating that the correct construction of the phrase " 'for any reason' " was " 'for any reason that the actor [Amana] deems sufficient.' " *Corenswet,* 594 F.2d at 135. In addition, even if a reason was required, the court found that Amana's desire to give the distributorship to another company with whom it was negotiating provided such a reason. *Id.* The court held that the understanding of both parties that Amana's usual practice was *not* to terminate arbitrarily conflicted with the express term permitting arbitrary termination that would control under U.C.C. § 1-205. The court found support for its conclusion in U.C.C. § 2-309(2), which states that a contract indefinite in duration "may be terminated at any time by either party." 594 F.2d at 137. Continuing its attack on the good faith argument of Corenswet, the court asserted that terminations without cause "almost always" will constitute bad faith and that focusing on the state of mind of

ity is that the parties did not even consider the question of termination for ill will.[195]

Evidence such as admissions and admissible oral representations regarding the meaning of the language or definitional language in the contract may create a strong inference about the parties' intentions. Representations to the franchisee about the duration of other franchises may also create some weaker inferences as to the franchisee's expectations concerning duration under the "for any reason" clause.[196] In the absence of relative certainty, a court, in inferring the intentions of the parties, may also consider whether reasonable parties bargaining fairly would agree to a relationship requiring immense investment by the franchisee, yet subject to termination by the franchisor without cause and without a right to recoup either reliance expenditures or profits. If parties bargaining fairly would not make such an agreement, the termination would ordinarily be in bad faith.

Even in the absence of sufficient probative evidence of the parties' intentions, the court may adhere to the fiction that the parties' intentions control the good faith determination and, consequently, the right of termination. Despite the court's professed adherence to the parties' intent, however, the fairness norms described in this article often appear to constitute the underlying basis for the decisions.[197] Under the good

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the terminating party will result in the abolition of unrestricted termination clauses. *Id.* at 138.

[195] *See, e.g.,* Gellhorn, *supra* note 21, at 466 (in drafting franchise agreements, the parties "often cover the problem of termination only cursorily . . .").

[196] The decision of the Fifth Circuit in *Corenswet* is troubling because the evidence consisting of Amana's previous treatment of Corenswet and other distributors and of Amana's representations made to Corenswet suggested that Corenswet reasonably expected its relationship with Amana to be a "lasting one" as long as it performed satisfactorily. 594 F.2d at 132. The court's reliance on U.C.C. § 1-205, which asserts that express language "controls" course of dealing and trade usage evidence, depends on the supposition that the "for any reason" clause unambiguously allocated the risk of ill will termination to Corenswet. As the district court realized, however, the language could also be interpreted to permit termination for any "good faith" reason. *See, e.g.,* Saarela v. Hoglund, 198 Ill. App. 485, 487-88 (1916); Dubois v. Gentry, 182 Tenn. 103, 108-09, 184 S.W.2d 369, 371 (1945).

Even if the termination clause on its face permitted an ill will termination, the court ignored common law and Code precedent and numerous commentaries that repudiate the "plain meaning" approach. *See, e.g.,* E. FARNSWORTH, *supra* note 24, at 492-95; RESTATEMENT (SECOND) OF CONTRACTS § 212(1) and comment b (1979). These authorities reason that extrinsic evidence may be considered to determine whether the parties intended to adopt a dictionary meaning of the contract language. If the Fifth Circuit had considered extrinsic evidence in this manner, it might have seen that the parties did *not* intend to adopt a meaning of the "for any reason" termination clause that would allow Amana to terminate in order to seek revenge.

In addition, because U.C.C. § 1-203 supplements U.C.C. Article 2 with the obligation of good faith, § 2-309(2) should be read to permit termination at any time *in good faith.* *See* Tele-Controls, Inc. v. Ford Indus., 388 F.2d 48, 51 (7th Cir. 1967). Any other construction contradicts the central purpose and policy of the Code requiring good faith and fair dealing in commercial transactions and belies the express language of § 1-203.

[197] Courts, for example, may base the termination decision on the "unfairness" of termi-

faith fairness approach, the court must balance the franchisee's reliance losses and unrealized expected gains against the franchisor's right to rid itself of a franchisee that is performing satisfactorily but that it does not like.[198]

3. *Unconscionability*

The application of unconscionability or good faith performance to the termination of contracts of indefinite duration has been the subject of some debate.[199] Problems involving harsh express termination clauses test the limits of freedom of contract and thereby fall, as we have seen,[200] within the province of unconscionability. Conversely, agreements silent on duration command a good faith performance analysis because courts must investigate the parties' intentions. But what of those agreements that contain termination clauses that are ambiguous? Because of the similarity of analysis under each approach in such cases, the issue of which doctrine to apply is less significant.

Suppose, for example, that the parties specifically intended the ambiguous "for any reason" clause in the franchise termination problem to permit termination for ill will. Such a termination will not be countenanced if the clause is unconscionable.[201] Similar to good faith perform-

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nating a franchisee in light of its large reliance expenditures. *See* Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 373, 294 A.2d 253, 262 (1972), *aff'd,* 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied,* 415 U.S. 920 (1974); *see also* United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985, 989 (4th Cir. 1981); Maddaloni v. Western Mass. Bus Lines, Inc., 386 Mass. 877, 438 N.E.2d 351 (1982). *But see Corenswet,* 594 F.2d at 132.

198 In *Corenswet,* for example, the reliance interest of Corenswet was well documented. 594 F.2d at 132. *See also* McGinnis Piano & Organ Co. v. Yamaha Int'l Corp., 480 F.2d 474, 477 (8th Cir. 1973); deTreville v. Outboard Marine Corp., 439 F.2d 1099 (4th Cir. 1971). In addition, even though Corenswet had recouped part of its investment, the court should not have ignored the potential for future return on its long-term investment in considering the harm to Corenswet from termination. *See, e.g.,* Des Moines Blue Ribbon Distrib., Inc. v. Drewrys, Ltd., 129 N.W.2d 731, 737 (Iowa 1974) (citing cases). On the other side, the evidence suggested that Corenswet was an excellent franchisee and Amana would not suffer harm by the continuation of the relationship. The reasonableness of Amana's conduct is also subject to criticism. Apparently Amana continued to negotiate with Corenswet even though it intended to terminate, and, in fact, was actively negotiating with another distributor to take Corenswet's place. Because of Amana's unfair tactics, the material harm to Corenswet on termination, and the profitability of the agreement to Amana, the decision of the Fifth Circuit in favor of Amana seems incorrect.

Unallocated termination risks arise in many different contexts. For an example of an employment contract termination, see McKinney v. National Dairy Council, 491 F. Supp. 1108, 1118 (D. Mass. 1980) (contract held to contain implied covenant of good faith and fair dealing breached by termination on basis of age).

199 Gellhorn, for example, favors unconscionability for regulating franchise termination, Gellhorn, *supra* note 21, whereas Hewitt favors good faith, Hewitt, *supra* note 113. *See also* Goetz & Scott, *supra* note 58, at 1137-40.

200 *See supra* notes 25-39 and accompanying text.

201 *See* Ashland Oil, Inc. v. Donahue, 223 S.E.2d 433, 440 (W. Va. 1976); *see also* Shell Oil Co. v. Marinello, 63 N.J. 402, 307 A.2d 598 (1973), *cert. denied,* 415 U.S. 920 (1974); *supra* notes 25-37 and accompanying text.

ance, the extent of the franchisee's reliance losses and expected gains are elements of unconscionability because they indicate whether the termination clause destroyed the essence of the franchisee's deal.[202] The reliance element requires investigation of the parties' positions at the time of contract breakdown, a determination that courts do not generally recognize as a function of unconscionability.[203] The actual reliance loss is nevertheless significant in determining unconscionability because the proponent of unconscionability will assert that the parties intended the termination clause at the time of contracting to cover the particular situation[204] (i.e., the parties "contemplated" that the franchisor could terminate for ill will before the franchisee recouped a long-term investment).

In addition to actual reliance losses and expected gains, courts would investigate the need for a broad termination right in both good faith termination and unconscionability cases. In the good faith termination context, the courts would focus on the immediate impact of denying to the franchisor a right of termination for ill will, whereas in the unconscionability realm the courts' focus would include whether, on a more general level, the broad termination right fosters a legitimate need of the franchisor. In either case, however, courts would balance the justification for the termination right against the franchisee's reliance losses.[205]

Under either good faith or unconscionability analysis, the court would also inquire into the status or bargaining position of the franchisee.[206] In unconscionability cases, the franchisee's bargaining position is probative of whether the franchisee truly assented to the suspect termination clause. In good faith inquiries, the bargaining position of the franchisee would be of some relevance to the question of how the parties allocated risks in the absence of clarity in the contract.

The court's decision whether to apply good faith performance or unconscionability to the franchise termination problem will depend on whether it finds the "for any reason" termination clause to be suffi-

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202 Professor Gellhorn proposed the following test for unconscionability:

> *[W]hether the harm which will or is likely to result to the terminated party from enforcing the termination provision is proportional to the harm which will or is likely to result to the terminating party if the provision is not enforced.* Again, equivalence of harm is not the test; only *disproportionate* harm is censured. This test would be applied in light of the facts known at the time of actual or proposed termination.

Gellhorn, *supra* note 21, at 517-18 (emphasis in original) (footnote omitted).

203 *See, e.g.,* U.C.C. § 2-302(1) (1977).

204 *See* Ellinghaus, *In Defense of Unconscionability,* 78 YALE L.J. 757, 802-03 (1969).

205 *See* Zapatha v. Dairy Mart, Inc., 318 Mass. 284, 408 N.E.2d 1370, 1377-78 (1980) (no unconscionability or bad faith because no "potential" for loss of investment existed; franchisor was obligated to repurchase inventory and franchisee failed to show that termination provision was "not reasonably related to business needs").

206 *See supra* notes 28-32 and accompanying text.

ciently broad to include termination for spiteful reasons. If the provision is sufficiently broad, unconscionability is the proper approach. If not, the question becomes one of good faith performance. Ultimately, because the criteria for determining good faith performance and unconscionability are so similar in cases involving ambiguous termination clauses,[207] courts should be concerned less with which principle to apply and instead direct their judicial energies toward the task of applying the fairness norms.

B. Cessation on the Basis of Excuse: Mistake, Impossibility, Impracticability, and Frustration

Courts may excuse parties from performance because of unexpected difficulties that make performance unfairly onerous or impossible.[208] Relief in the event of these unexpected circumstances is based on the impossibility, impracticability, or frustration doctrines.[209] In addition, a party may also be excused when the agreement was based on a mutually held and materially erroneous view of *existing* facts.[210] Courts

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207 *Cf.* Hewitt, *supra* note 113, at 235 (expressing desire for unified consistent application of criteria underlying the two doctrines).

Under the U.C.C. differences exist in the application of unconscionability and good faith performance because of differences in form. For example, good faith is defined in the Code. *See* U.C.C. §§ 1-201(19), 2-103(1)(b) (1977). Unconscionability, on the other hand, is undefined. *See* U.C.C. § 2-302. In addition, good faith is cited in many Article 2 provisions, whereas unconscionability is found in only three provisions. The frequency of reference to good faith in Article 2 may raise the negative inference that the concept does not supplement sections in which it is not specifically mentioned, whereas unconscionability overrides all sections. *See, e.g.,* Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d at 138.

A judge makes a finding of unconscionability under U.C.C. § 2-302, whereas questions of honesty and reasonableness in good faith performance are reserved for the factfinder. *See, e.g.,* Banner Iron Works, Inc. v. Amax Zinc Co., 621 F.2d 883, 888 (8th Cir. 1980) (good faith issue is jury question). *But see* Tipton v. Woodbury, 616 F.2d 170 (5th Cir. 1980) (good faith determination made by judge). Because unconscionability is a question of law, it more closely resembles a general equitable principle than does good faith performance.

208 *See, e.g., In re* M & M Transp. Co., 13 Bankr. 861, 868 (S.D.N.Y. 1981) (frustration); Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129 (N.D. Iowa 1978) (impracticability), *rev'd on other grounds,* 603 F.2d 1301 (8th Cir. 1979); Northern Corp. v. Chugach Elec. Ass'n, 518 P.2d 76 (impossibility), *modified on other grounds,* 523 P.2d 1243 (Alaska 1974); Missouri Pub. Serv. Co. v. Peabody Coal Co., 583 S.W.2d 721 (Mo. App.) (no excuse for impracticability), *cert. denied,* 444 U.S. 865 (1979); U.C.C. § 2-615 (1977); *see also infra* note 215.

209 *See generally* Posner & Rosenfeld, *supra* note 57, at 85-86; *infra* notes 217-37 and accompanying text.

210 *See, e.g., In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 517 F. Supp. 440, 457-58 (E.D. Va. 1981) (dictum); Sherwood v. Walker, 66 Mich. 568, 33 N.W. 919 (1887). The Restatement (Second) of Contracts does not clearly distinguish mistake and the other excuse doctrines on the basis of existing fact. *See* RESTATEMENT (SECOND) OF CONTRACTS introductory note to ch. 11 (1979); *see also* Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53, 61-63 (W.D. Pa. 1980).

Generally when a party receiving a bid has not yet relied, the bidding party who has acted reasonably may be relieved of the burden of a unilateral mistake as well. *See, e.g.,* Kemper Constr. Co. v. City of Los Angeles, 37 Cal. 2d 696, 701, 235 P.2d 7, 10-11 (1951); Steinmeyer v. Schroeppel, 226 Ill. 9, 80 N.E. 564 (1907); Harry Harris, Inc. v. Quality Constr.

base relief from such an agreement on the general doctrine of mistake.[211] Under all of these doctrines, courts afford relief when the parties did not allocate the risk of the actual, but unknown, or supervening circumstances; freedom of contract does not constrain the courts in such situations.

In contrast to the problem of termination-at-will, the availability of relief from performance on excuse grounds has gradually increased.[212] Early cases excused performance only on the basis of objective impossibility where the parties were literally incapable of performance due to circumstances that were "unforeseeable" at the time of contract formation.[213] Today, although courts still employ impracticability rather sparingly,[214] a finding of impracticability requires only that performance has become extremely onerous due to the occurrence of an unforeseeable, or in some cases, an unexpected contingency.[215] In addition, frustration requires only that the terminating party's expected consideration has lost much of its value due to an unanticipated event.[216]

In analyzing excuse doctrine cases, courts first interpret the contract and surrounding circumstances to determine whether parties have allocated the risk of a contingency. If the parties have allocated the risk

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Co., 593 S.W.2d 872, 874 (Ky. Ct. App. 1979); James T. Taylor & Sons, Inc. v. Arlington Indep. School Dist., 160 Tex. 617, 335 S.W.2d 371 (1960). *See also* J. MURRAY, JR., MURRAY ON CONTRACTS § 129, at 267 n.6 (1974) (citing *Kemper).*

211 *See* Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53, 60-70 (W.D. Pa. 1980) (discussing doctrine of unilateral and mutual mistake in light of Professor Corbin's analysis and Restatement (Second) of Contracts).

212 *See* E. FARNSWORTH, *supra* note 24, at 683 (1982); RESTATEMENT (SECOND) OF CONTRACTS introductory note to ch. 11 (1979); *see also* Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980); U.C.C. § 2-615 (1977).

213 *See, e.g.,* Mahaska County State Bank v. Brown, 159 Iowa 577, 585, 141 N.W. 459, 462 (1913); 18 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1963 (3d ed. 1978) (impracticability of performance was not originally recognized as an excuse).

214 Despite the liberalization of a party's right to discharge on excuse grounds, evidenced by U.C.C. § 2-615, many courts have applied the section restrictively. *See, e.g.,* Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129 (N.D. Iowa 1978). *See generally* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 132-33 (2d ed. 1980). Courts may be reading § 2-615 restrictively because many of the litigated cases involve long-term contracts, which engender substantial reliance by both parties. Thus, although the courts apparently focus on the plight of the party seeking discharge, they also consider the harmful effect of discharge on the party seeking enforcement. *See infra* notes 221-37 and accompanying text. When such harm is substantial, perhaps the court should impose a price adjustment. *See* Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53, 58 (W.D. Pa. 1980) (Essex needed long-term supply of aluminum to assure continued operation of its expensive machinery); Speidel, *supra* note 15; *infra* notes 234-37.

215 Some courts require the event causing the additional expense to be unforeseeable. *See, e.g.,* Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 438, 441-42 (S.D. Fla. 1975). Other cases, however, recognize that foreseeability does not necessarily prove a contingency's allocation. *See* Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 318 (D.C. Cir. 1966); Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53, 76 (W.D. Pa. 1981).

216 *In re* M & M Transp. Co., 13 Bankr. 861, 869 (S.D.N.Y. 1981); Krell v. Henry, [1903] 2 K.B. 740, 746 (C.A.).

to the promisor, an excuse approach is not available and unconscionability or related grounds would afford the only possible relief to the promisor. If the parties have failed to allocate the risk then the courts must fill the gap.[217] When the contract and surrounding circumstances are unclear, courts may isolate several factors in identifying the parties' allocation of the risk of contingencies. As we have seen, these factors may be unreliable in many cases.[218] A helpful generalization in predicting a court's finding on the parties' risk allocation or in predicting how a court will allocate the risk in gap situations is that when losses to the promisor would be moderate courts will not excuse performance,[219] but when losses would be extreme and the promisor has acted reasonably courts will excuse performance.[220]

Courts do not ignore the interests of the party seeking enforcement in the excuse cases. In ascertaining the parties' intentions on the allocation of the risk of a particular event, courts may refer to the expected

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217 *See* cases cited *infra* notes 219-20; *see also* Posner & Rosenfeld, *supra* note 57, at 86 ("In every discharge case the basic problem is the same: to decide who should bear the loss resulting from an event that has rendered performance by one party uneconomical.").

218 *See supra* notes 42-72 and accompanying text.

219 *See* American Trading & Prod. Corp. v. Shell Int'l Marine Ltd., 453 F.2d 939 (2d Cir. 1972) (31.5% increase); Transatlantic Fin. Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966) (14% increase); United States v. Wegematic Corp., 360 F.2d 674 (2d Cir. 1966) (correction cost not prohibitive); *see also In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 517 F. Supp. 440, 453 (E.D. Va. 1981) ("no showing" that Westinghouse lost money on "entire undertaking"); *In re* M & M Transp. Co., 13 Bankr. 861, 870 (S.D.N.Y. 1981) (no finding of frustration, little harm to party urging its application). Courts have decided some impracticability cases against energy suppliers because the suppliers took advantage of market conditions to increase overall profits even though the particular contract was unprofitable. Generally, these courts have found that the increased costs with respect to performing the contract at issue resulted from the supplier's own marketing decisions. *E.g.,* Iowa Elec. Light & Power Co. v. Atlas Corp., 467 F. Supp. 129, 133 (N.D. Iowa 1978); Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 441 (S.D. Fla. 1975).

220 *See* Northern Corp. v. Chugach Elec. Ass'n, 518 P.2d 76, *modified on other grounds,* 523 P.2d 1243 (Alaska 1974) (93% increase); Mineral Park Land Co. v. Howard, 172 Cal. 289, 293, 156 P. 458, 460 (1916) (tenfold increase); Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980) ($60 to $75 million out-of-pocket loss; court imposed price adjustment). Courts often refer to the senselessness of insisting on performance. *See, e.g.,* Transatlantic Fin. Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966) (dicta); *In re* M & M Transp. Co., 13 Bankr. 861, 869 (S.D.N.Y. 1981) (citing J. MURRAY, JR., MURRAY ON CONTRACTS § 202 (1974)); *see also* Maple Farms Inc. v. City School Dist., 76 Misc. 2d 1080, 1085, 352 N.Y.S.2d 784, 790 (1974) ("There is no precise point, *though such could conceivably be reached,* at which an increase in price of raw goods above the norm would be so disproportionate to the risk assumed as to amount to 'impracticality' [sic] in a commercial sense.") (emphasis added); Joskow, *supra* note 130, at 160 ("In essence the impracticability doctrine says that contracts will be enforced . . . unless it really hurts. Other things being equal, the seller bears all of the risk unless performance is extremely burdensome, in which case the buyer bears all the risk."); Note, *supra* note 62, at 575, 589.

U.C.C. § 2-615(1), although confusingly worded, adopts an impracticability approach similar to that traced in this article. *See generally* Speidel, *supra* note 56, at 257-71. Professor Speidel urges that impracticability hinges on "the degree to which performance has been made different, rather than upon the degree of financial hardship suffered." *Id.* at 266. He recognizes, however, that courts have focused on the extent of financial loss. *Id.* at 267.

gains of the party seeking enforcement.[221] Because the very purpose of a contract is to ensure performance under unknown conditions, a court may reason that the parties must have intended performance to occur under the particular circumstances.[222] Even when courts abandon the intentions approach, they continue to consider the interests of the party seeking performance. For example, courts have applied section 2-615 of the Uniform Commercial Code on impracticability parsimoniously because most of the cases involve long-term contracts that engender substantial reliance and expectations on the part of *both* parties.[223] Thus, although courts often expressly focus on the plight of the party seeking a discharge, they also consider, without always acknowledging, the effect of discharge on the other party.[224]

In cases involving large increases in the cost of performance, such as the oil supply case discussed in Part I,[225] a discharge will affect the party seeking enforcement in two ways. First, a discharge will assure that the party seeking performance will not enjoy the balance sheet gain of a large market-price contract-price differential. In this respect a court must confront the problem of whether the party seeking enforcement has legitimate expectations of performance.[226] The party seeking enforcement may not have contracted for performance under the exigent circumstances and thus, it may not be entitled to the gains.[227] On the other hand, the party seeking cessation may not be entitled to a discharge under the circumstances. All other things being equal, in choosing between compelling the promisor to suffer a material loss, or permitting a discharge that denies a large gain to the promisee, courts would presumably lean towards the latter; courts appear to treat out-of-pocket losses as more real and more deserving of relief than the loss of income.[228] In an uncertain situation, this approach would leave the

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221 *E.g.,* United States v. Wegematic Corp., 360 F.2d 674 (2d Cir. 1966); *In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 517 F. Supp. 440 (E.D. Va. 1981).

222 *E.g.,* Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 442 (S.D. Fla. 1975) (price increases were "a fact of life for the future") (quoting one party's contract negotiator); *see also supra* notes 49-50 and accompanying text.

223 *See supra* note 214; *see also* Speidel, *supra* note 15, at 373.

Conversely, Professor Gellhorn suggests that in franchise termination cases courts may not have applied unconscionability very often because "the losses to the terminated party often have not seemed severe, especially when compared to the potential losses to the manufacturer, if the termination provision were not enforced." Gellhorn, *supra* note 21, at 517.

224 For cases expressly considering the effect of a discharge on the party asserting enforceability, see, for example *In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 517 F. Supp. 440 (E.D. Va. 1981); Aluminum Co. of Am. v. Essex Group, Inc. 499 F. Supp. 53 (W.D. Pa. 1980); *see also* Fuller & Perdue, *supra* note 2, at 381-82 (especially discussion of Nicol v. Fitch, 115 Mich. 15, 72 N.W. 988 (1897), therein).

225 *See supra* notes 45-46, 49-50, 56 and accompanying text.

226 *See supra* notes 89-93 and accompanying text.

227 *See supra* note 56.

228 *See, e.g.,* C.R. Fedrick, Inc. v. Borg-Warner Corp., 552 F.2d 852 (9th Cir. 1977); Caplan v. Roberts, 506 F.2d 1039 (9th Cir. 1974).

parties in the status quo ante.[229]

Second, the party seeking enforcement of a long-term supply contract may have incurred large reliance expenses or may have foregone other profitable opportunities.[230] That party should recoup its costs incurred in preparing for performance or the value of foregone opportunities if they are not too remote. When these interests are substantial, discharge may be inappropriate. Because performance by the party seeking discharge may ultimately lead to forfeiture, however, the appropriate remedy may be sharing the losses, such as a discharge, but only after recoupment of reliance expenditures. Courts confronted with this problem have not always been so flexible. Instead, upon granting a discharge, many have required only that each party return the benefit conferred by the other party.[231] In a few cases, however, "benefit conferred" has included reliance expenditures that do not technically benefit the other party.[232] When courts can apportion a contract, the party seeking enforcement prior to the occurrence of the unallocated contingency has also recovered expectancy damages.[233]

Even when courts do not apply an excuse doctrine they may still restrict a party's right to insist on a promised performance out of concern for the potential harm to the other party. Professor Speidel has recently discussed the problem of a party's refusal to negotiate a modification when an unanticipated event has made performance of a long-term supply contract unfairly costly.[234] Even when a party seeking discharge would be unsuccessful, Professor Speidel suggests that in some situations courts should restrict the right to "hold" that party to the contract after an unanticipated event.[235] He recommends a judicially imposed price adjustment when the "advantaged" party refuses to accept "an equitable adjustment proposed in good faith."[236] Speidel justifies the adjustment on the theory that the parties are obligated to share

229 The response is similar to that of courts when faced with a request for a mandatory injunction in which the moving party cannot demonstrate the requisite likelihood of success on the merits. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 110 (1973).

230 Professor Speidel posits the example of an electric utility that depends on a supplier for a specified grade of coal for a new generator. Speidel, *supra* note 15, at 373.

231 *See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS §§ 13-17 (2d ed. 1977); Farnsworth, *supra* note 150, at 381.

232 *See generally* RESTATEMENT (SECOND) OF CONTRACTS §§ 158, 272 (1979) (permitting relying party recovery for reliance loss regardless of whether it benefits other party); Fuller & Perdue, *supra* note 2, at 380-81; Perillo, *Restitution in the Second Restatement of Contracts,* 81 COLUM. L. REV. 37, 39 (1981).

233 *See* Perillo, *supra* note 232.

234 *See* Speidel, *supra* note 15, at 370 ("[T]he question addressed is when, if ever, will the advantaged party's refusal to consent to a price term adjustment offered by the disadvantaged party justify a court-imposed adjustment?").

235 *Id.*

236 *Id.* at 418 ("[I]ntervention is justified only as a remedy for the advantaged party's improper refusal to accept an equitable adjustment proposed in good faith.").

unexpected gains and losses and to cooperate during the course of the contract.[237] Because Professor Speidel's approach would apply to situations in which excuse doctrines are inapplicable, it would increase the protection afforded a dependent party and, concomitantly would decrease the advantaged party's right to insist on the original performance. Accordingly, his resolution is consistent with the modern approach to cessation problems identified herein.

C. Termination Due to Failure of an Express Condition or Material Breach

Contracting parties may expressly condition one performance on another promised performance. For example, the completion of the construction of a house may be an express condition precedent to a landowner's obligation to pay for the house. When a party fails to perform such a promissory condition precedent, the injured party is released from its obligation to perform and may recover damages. Enforcement of the promissory condition precedent, however, may harm the breaching party far more than nonenforcement would harm the injured party. The contractor, for example, may have put all the bricks in place but one. Judicial doctrines such as divisibility, waiver, restitution-in-behalf-of-a-party-in-default, forfeiture, and unconscionability mitigate the potential unfairness of termination by restricting the right of the injured party to avoid the bargain.[238]

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237 Professor Speidel cautions that a price adjustment remedy should not be awarded "without examining the quality of the ex post bargaining." *Id.* at 412. At least one court has imposed an "equitable" price adjustment in a long-term supply contract. *See* Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980) (discussed in Speidel, *supra* note 15); *see also* U.C.C. § 2-615 comment 6 (1977) (requiring courts to make adjustments in light of [the provision's] purposes, and the general policy . . . to use equitable principles in furtherance of commercial standards and good faith").

The problem of when courts should require a modification on fairness grounds presents the converse of the problem of when courts should bar enforcement of a modification made in bad faith. Nevertheless, each problem involves avoiding material loss to the disadvantaged party and restricting the rights of the other party. A court imposed modification limits the right to insist on performance. According to Professor Speidel, courts should base such a modification on an evaluation of the unallocated losses suffered and the bargaining tactics of the party seeking modification. *Id.* at 412. In deciding whether to enforce a party-imposed modification, courts evaluate the materiality of the suggested modification, the bargaining tactics of the party seeking a modification, and the availability of alternative choices to the other party. Between these extremes, each party has the right to insist on performance or to agree voluntarily to modify the agreement.

238 *See, e.g.,* Holiday Inns of Am., Inc. v. Knight, 70 Cal. 2d 327, 450 P.2d 42 (1969) (forfeiture); Margolin v. Franklin, 132 Ill. App. 2d 527, 270 N.E.2d 140 (1971) (waiver); Britton v. Turner, 6 N.H. 481 (1834) (restitution); *supra* notes 25-39 and accompanying text (unconscionability); *see also* E. FARNSWORTH, *supra* note 24, at 570-71 ("disproportionate forfeiture"); Patterson, *Constructive Conditions in Contracts,* 42 COLUM. L. REV. 903, 926 (1942) (prevention of forfeitures). These doctrines also temper the right of a party to cease performance after the failure of a pure condition precedent, i.e., the failure of a condition precedent not in the control of the other party.

When the parties have failed to expressly state the promissory conditions precedent, the court must evaluate contractual language and the surrounding circumstances to determine whether such conditions exist. As with the other areas of performance cessation, sometimes this evidence will strongly suggest the actual intentions of the parties as to what types of breach permit the injured party to terminate. Often, however, the evidence will be less helpful.

Inquiry into the existence of implied promissory conditions entails a determination of whether the injured party will receive substantially what it bargained for. If the court determines it will receive its bargain, then the injured party must perform; its own failure to perform would constitute a material breach of the contract. If not, then the breach is material, the injured party's duty to perform is discharged and damages may be recovered.[239] Factors that courts enumerate in determining materiality of the breach reflect the comparative equities approach described in Part I of this article. These factors include the extent to which the injured party can be made whole under the contract (i.e., whether the party can avoid forfeiture) and the extent of harm to the breaching party on termination measured primarily by reliance losses.[240] Although this inquiry focuses upon the reliance rather than the expectation interest of the breaching party, if the court determines that the injured party's termination was wrongful, the proper remedy is expectancy damages.[241] Thus, if a landowner wrongfully ceases performance after an "immaterial" breach by the contractor, the contractor will be entitled to an expectancy recovery, even if the court based its determination of immateriality primarily on the contractor's reliance expenditures. Any other result in this context would challenge the foundation of expectancy damages by limiting the liability of a party who wrongfully terminates a contract to reliance losses only.[242]

Contract law increasingly has restricted the right of cessation for breach because a discharge of the injured party may result in severe harm to the breaching party. The Restatement (Second) of Contracts, for example, restricts the right to cease performance on material breach grounds by distinguishing between material breaches that permit suspension of performance, and material breaches that permit termina-

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239 *See, e.g.,* RESTATEMENT (SECOND) OF CONTRACTS § 241 (1979).

240 *See id.* § 241 and especially comment d; *see also* E. FARNSWORTH, *supra* note 24, at 552 (preference against forfeiture); Patterson, *supra* note 238, at 927 (foonote omitted):

> [T]he process of determining when a party's breach is sufficiently "material" to justify the other in ceasing performance is influenced by the extent to which the former has committed himself as a result of the contract, even though his commitment has not enriched the other party. Whether one calls this "hardship" or "forfeiture," the principle is clear.

241 *See, e.g.,* E. FARNSWORTH, *supra* note 24, at 840 & n.8; *cf.* U.C.C. § 1-106 (1977) (remedies to be liberally administered).

242 *See supra* note 146.

tion.[243] Under the Uniform Commercial Code, the right to cure and to demand adequate assurances of performance may help to "keep the deal together."[244] The doctrines of divisibility and restitution-in-behalf-of-a-party-in-default restrict the right of injured parties to avoid deals after failure of implied as well as express conditions.[245] If a breaching party offers to perform after a material breach, courts deny the injured party the right to refuse to accede to the new offer and to avoid dealing with the breaching party in some situations. For example, when a breaching party offers to cure where there is little risk of subsequent breach the courts may find that a failure to accept the offer of cure is a failure to minimize damages.[246] By barring complete termination, each of these approaches avoids severe harm to the breaching party and concomitantly, benefits society by providing greater assurance of contract performance.[247]

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243 RESTATEMENT (SECOND) OF CONTRACTS § 242 (1979).

244 *See, e.g.,* U.C.C. § 2-508 (1977) (cure by seller of improper tender or delivery; replacement); *id.* § 2-609 (right to adequate assurance of performance). *See generally* Hillman, *supra* note 122.

245 *See, e.g.,* Utah Int'l, Inc. v. Colorado-Ute Elec. Ass'n, Inc., 425 F. Supp. 1093, 1098-99 (D. Colo. 1976); Britton v. Turner, 6 N.H. 481 (1834).

246 Hillman, *supra* note 122.

247 Contract law's approach to liquidated damages provisions also evidences the law's reluctance to impose a forfeiture on the breaching party. Such provisions are enforceable only when actual damages were difficult to determine at the time of contract formation *and* when the stipulated amount is a reasonable estimate of the anticipated loss. *See generally* Gellhorn, *supra* note 21, at 511-12 (discussing limitations on contract termination rights in franchise cancellation). *But see* U.C.C. § 2-718(1) (1977) ("Damages for breach . . . may be liquidated . . . but only at an amount which is reasonable in the light of the anticipated *or* actual harm caused by the breach . . . .") (emphasis added).

Another cessation concept involves termination upon failure of the parties to satisfy a formality. A party may terminate a contract made unenforceable by the failure of the parties to satisfy a requisite such as clarity, mutuality of obligation, or a writing. *See, e.g.,* Transamerica Equip. Leasing Corp. v. Union Bank, 426 F.2d 273, 274 (9th Cir. 1970) (clarity); Tidmore v. Office of Gov't Dep't of Indus. Dev., 636 P.2d 386, 392 (Okla. Ct. App. 1981) (mutuality); Wamser v. Bamberger, 101 Wis. 2d 637, 643-45, 305 N.W.2d 158, 160-62 (Wis. Ct. App. 1981) (statute of frauds). Courts avoid termination on these grounds, however, when one of the parties will suffer substantial harm. In evaluating whether contract language is sufficient to avoid a claim of ambiguity, failure of mutuality, or illusoriness, courts may be motivated to "save" a contract on the basis of substantial reliance by one of the parties. Such reliance demonstrates the serious intent of the parties to contract, which a court may refuse to defeat on the basis of a technicality. *Cf.* Outlet Embroidery Co. v. Derwent Mills Ltd., 254 N.Y. 179, 172 N.E. 462 (1930) (letters from one merchant to another, constituting sales contract, are read as businessmen would read them, and will only as a last resort be thrown out as meaningless.); Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917) (implied term to use reasonable efforts to market goods prevented contract invalidation for lack of mutuality).

If the court cannot rehabilitate contractual language, it may apply the doctrine of promissory or equitable estoppel to protect parties who have reasonably relied on such abortive contracts. Instead of bargain, detrimental reliance in the form of expenditures or lost opportunities, *see, e.g.,* Monarco v. Lo Greco, 35 Cal. 2d 621, 623-26, 220 P.2d 737, 739-41 (1950) (en banc), controls at least limited enforcement of these arrangements. *See* Fuller & Perdue, *supra* note 2, at 394-95; Henderson, *Promissory Estoppel and Traditional Contract Doctrine,* 78 YALE

CONCLUSION

This examination of cessation cases suggests that many areas of contract doctrine heretofore considered as separate or distinct are analytically very similar. Whether it be termination of a contract of indefinite duration, termination after breach, or cessation on excuse grounds, courts first examine contractual language and surrounding circumstances to ascertain whether the parties have assigned the right of cessation. If the agreement fails to clearly demonstrate the parties' intentions or is suspect under an unconscionability or related inquiry, courts typically weigh potential gains and losses from cessation and evaluate the reasonableness of the parties' conduct to ensure a fair result. Recognizing the true basis for court decisions in cessation cases clarifies various issues. The fairness analysis illuminates, for example, the relationship of good faith and unconscionability to the problem of termination-at-will, the relationships of various excuse doctrines such as mistake, impracticability, and frustration to each other, the reluctance of courts to apply modern commercial impracticability, and the right of cessation after a "material" breach.

The cessation approach establishes in contracting parties the duty to consider the effect of performance related decisions on their contracting counterparts. The quasi-fiduciary responsibility between contracting parties enlarges the duty of each party to refrain from conduct similar to that recognized as actionable on tort grounds.[248] For example, although a person generally has no duty to rescue a stranger,[249] once he has begun his attempt he has a duty to complete it in a reasonable fashion.[250] This principle is similar to the developing principle traced in this article that once a contractual relation has begun, a party has a duty to perform in a manner calculated, at least in part, to "protect" the other party.[251]

The balancing approach traced provides ample evidence of the em-

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L.J. 343, 364 (1969). Much of the litigation in this area deals with promises unenforceable under the statute of frauds. *E.g.,* Janke Constr. Co. v. Vulcan Materials Co., 386 F. Supp. 687, 696-97 (W.D. Wis. 1974), *aff'd,* 527 F.2d 772 (7th Cir. 1976) (and cases cited therein); Warder & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339 (Iowa 1979). When reliance is "justifiable and serious" courts discount the necessity of demonstrating a clear promise. Henderson, *supra,* at 364. Promissory estoppel embodies nothing more than a basic test of fairness. *Id.* at 383.

248 Courts have found that contracting parties must avoid conduct that constitutes an independent tort. For example, an employer may be liable in tort for a retaliatory termination of an employee. *See* Note, Kelsay v. Motorola, Inc.: *Tort Action For Retaliatory Discharge Upon Filing Workmen's Compensation Claims,* 12 J. MAR. J. PRAC. & PROC. 659, 675-77 (1979); Note, *supra* note 167, at 1818 n.13.

249 *But see* Weinrib, *The Case for a Duty to Rescue,* 90 YALE L.J. 247 (1980).

250 W. PROSSER, THE LAW OF TORTS 340-43 (4th ed. 1971).

251 The harm-avoidance principle demonstrates that obligations arising from contractual relations are significantly the product of interests independent of the parties' promises. *See* G. GILMORE, THE DEATH OF CONTRACT 68, 87-88 (1974); I. MACNEIL, *supra* note 68, at 58;

phasis modern courts place on equity and flexibility.[252] The approach can be criticized because of the sacrifice of certainty,[253] which may increase costs of contracting and litigation.[254] Adherence to fairness and flexibility, however, is in itself a social good because it encourages contract-making. When contracting parties believe that contract rules and principles are not arbitrary they may be more willing to enter contractual relationships; an approach free from inequities in gap filling and interpretation perpetuates that belief.[255]

Fried, Book Review, 93 HARV. L. REV. 1858, 1868 (1980); *see also supra* notes 106-24 and accompanying text.

252 In a recent essay, Professor Atiyah discussed the conflicting goals of judicial decision-making: to "encourage or discourage" behavior in the future and to "do justice" in the particular case. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law,* 65 IOWA L. REV. 1249, 1250, 1255 (1980). Atiyah characterizes the tension between these goals as between "principles and pragmatism." *Id.* at 1250. Concerned that "pragmatic" decisions may confuse the law, he concludes that the recent trend in judicial decisions towards pragmatism may raise questions about the legitimacy of the judicial role in our legal system.

253 *Id.* at 1259.

254 Joskow, *supra* note 130, at 175-76. Posner and Rosenfeld argue that specific rules on discharge "enhance the efficiency of the contract process," and to the extent that they allocate risks efficiently they eliminate the need for contracting parties to bargain with respect to those risks. Posner & Rosenfeld, *supra* note 57, at 114. On the uncertainty of rules, see Hillman *supra* note 6, at 15-16 & n.84 and Young, *supra* note 102, at 28-29.

255 *See* Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53, 65-66, 76 (W.D. Pa. 1980) ("Courts must decide the point at which the community's interest in predictable contract enforcement shall yield to the fact that enforcement of a particular contract would be commercially senseless and unjust."); Anderson, *supra* note 77, at 742; Speidel, *supra* note 15, at 373-75, 402.